Petition

No. 81-894

Office - Supreme Court, U.S.
FILED
NOV 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,

Petitioners,

v.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, THIRD JUDICIAL DISTRICT

GARY PETERLIN,
State's Attorney of LaSalle County

Of Counsel:
JOSEPH V. KARAGANIS
RUSSELL R. EGGERT
Special Assistant State's Attorneys

BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
130 East Madison Street
Ottawa, Illinois 61350
(815) 434-6206

150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

Randick Press Midwest, Inc. Chicago • 454-7600

QUESTION PRESENTED

Whether the decision of the Illinois court, which deprived petitioners of access to the courts to resolve disputed facts underlying petitioners' claims of constitutional and statutory violations where no other forum had the power to grant petitioners relief, was a denial of due process?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Pioneer's Hazardous Waste Landfill And The Agency Permit Proceedings	4
B. Pioneer's December 12, 1981 *Ex Parte* Submittals	6
C. The Agency Relied On Pioneer's *Ex Parte* Submittals In Issuing The Permit	7
D. The Attempt To Obtain Relief From The Illinois Pollution Control Board	9
E. The Suit In The Circuit Court	12
F. The Preliminary Injunction	13
G. The Post-Injunction Proceedings	14
H. The Illinois Appellate Court's Decision	15
I. Proceedings Before The Illinois Supreme Court	16
REASONS FOR GRANTING THE WRIT	17
Petitioners Have A Right Of Access To The Courts For A Hearing And Remedy For Violations Of Their Constitutional And Statutory Rights Where No Other Forum Has The Power To Provide A Remedy	17
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

	PAGE
Boddie v. *Connecticut*, 401 U. S. 371 (1971)	20, 21
Bounds v. *Smith*, 430 U. S. 817 (1977)	22
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673 (1930)	19, 20, 22
Cook County Federal Savings & Loan Association v. *Griffin*, 73 Ill. App. 3d 210, 391 N. E. 2d 473, 29 Ill. Dec. 210 (1st Dist. 1979)	18
Illinois Power Company v. *Illinois Environmental Protection Agency*, ___ PCB Opinions ___ (PCB No. 79-61, January 8, 1981)	10, 11, 15
Little v. *Streater*, ___ U. S. ___, 101 S. Ct. 2202 (1981)	21
Ohio Bell Telephone Co. v. *Public Utilities Commission*, 301 U. S. 292 (1937)	18
Wolff v. *McDonnell*, 418 U. S. 539 (1974)	21, 22

STATUTES

Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½ § 1001, *et seq.*	*passim*
§ 1003	5
§ 1021	5
§ 1039	9, 12
§ 1040	9, 10
§ 1041	9
Illinois Administrative Procedure Act, Ill. Rev. Stat. ch. 127 §§ 1001, *et seq.*	*passim*
§ 1010-1015	5
§ 1010	5
§ 1011	5
§ 1012	5
§ 1014	3, 5, 7, 13, 18
§ 1015	5
§ 1018	6, 12

PAGE

RULES AND REGULATIONS

Illinois Pollution Control Board Procedural Rule 503(a)(2) 11
Illinois Pollution Control Board Rules And Regulations, ch. 7: Solid Waste Rule 201 5

OTHER AUTHORITIES

Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce: Hazardous Waste Disposal Report, 96th Cong. 1st Sess. (1979) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,

Petitioners,

v.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, THIRD JUDICIAL DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Illinois appellate court, third judicial district, in the above-entitled cause.

OPINIONS BELOW

The opinion of the Illinois appellate court, third judicial district, is published at 54 Ill. Dec. 107, 98 Ill. App. 3d 615, 424 N. E. 2d 857 (3rd Dist. 1981), and is reprinted in the Appendix hereto at A.-2.

JURISDICTION

The judgment of the Illinois appellate court, third judicial district, was entered on July 27, 1981; no petition for rehearing was filed.

A timely petition for appeal as a matter of right, or, in the alternative for leave to appeal was filed in the Illinois supreme court on August 17, 1981. The Illinois supreme court denied the petition in an unreported Order without opinion on October 19, 1981. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Due Process Clause of Section 1 of the Fourteenth Amendment, United States Constitution:

> Section 1 . . . No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

This case involves the placement of a hazardous waste dump directly on top of the groundwater supply for petitioners and surrounding portions of central Illinois.[1] The severe health risks involved in hazardous waste dumping are well documented:

> Almost half the American population relies on groundwater for its drinking water supply. Further, almost one-fifth of America's population relies on groundwater from individual wells without the benefit of treatment systems. Inasmuch as these wells are rarely monitored, it is impossible to determine when human health is threatened

[1] The caption of this Petition contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

> by polluted water until after illness develops. Groundwater is also very difficult to clean up after it has been polluted.
>
> *Subcommittee On Oversight And Investigations Of The House Committee On Interstate And Foreign Commerce: Hazardous Waste Disposal Report*, 96th Cong., 1st Sess., 13 (1979).

Because of the serious public health risks involved in improper siting of hazardous waste dumps the Illinois legislature has prohibited the development (i. e., construction) of any such dumps without a permit and has given its citizens—like petitioners—the right to oppose a particular proposed site in adversary adjudicatory proceedings. The Illinois legislature has also passed a statute governing the procedures to be followed in such adjudicatory proceedings—called "contested cases".

These statutory procedures are contained in the Illinois Administrative Procedure Act and closely parallel the requirements of the Due Process Clause for adjudicatory proceedings, including disclosure of all evidence to all parties, an opportunity to respond and present rebuttal evidence, an opportunity for cross-examination, and a prohibition against any *ex parte* communications. These procedures are *mandatory* and agency actions *"shall be void"* if these procedures are not followed. Ill. Rev. Stat. ch. 127, § 1014.

It is beyond dispute that the state permit-granting agency engaged in wholesale violations of these statutory requirements by receiving repeated *ex parte* communications from the applicant concerning the merits of the permit application—without notice to petitioners and without giving petitioners an opportunity to respond to these *ex parte* evidentiary submissions.

When petitioners sought to have the facts underlying these constitutional and statutory violations adjudicated in the state administrative process they were told to present the issues to the state court. The petitioners brought the issues to the state court—and succeeded in proving the merits of their claims in

the trial court—only to be told by the Illinois appellate court that they had no right to be there; and that petitioners should first seek an administrative remedy which, in fact, was never available and which is not now open to it. As a result, petitioners have no forum anywhere in which they can prove the facts underlying these violations and obtain relief.

The law does not consign litigants to the kind of jurisdictional vacuum created by the appellate court's decision. Fundamental due process requires that where, as here, no other forum is empowered to provide petitioners relief, petitioners must have access to the courts for a hearing on the disputed fact issues underlying their constitutional and statutory claims, and a remedy.

A.

Pioneer's Hazardous Waste Landfill Proposal and the Agency Permit Proceedings

This controversy began with the proposal by respondents Pioneer Development, Pioneer Processing, Inc. and William Clarke (hereinafter collectively "Pioneer") to construct a hazardous waste landfill in LaSalle County. Pioneer's proposed 177-acre hazardous waste site is located in an abandoned surface coal ("strip") mine. The strip mining operation tore away virtually all of the sub-surface layers of soil and has in some locations on the site actually exposed the St. Peters Sandstone formation, which is a major subsurface aquifer for drinking water supplies for most of LaSalle County and surrounding portions of central Illinois. The site is located less than 1,000 feet from eight active domestic wells.

Given the extreme potential for contamination associated with a hazardous waste site, the Illinois Environmental Protection Act and the implementing Pollution Control Board regulations prohibit the construction of a hazardous waste landfill without a valid permit issued by the Illinois Environmental

Protection Agency (hereinafter "Agency"). Ill. Rev. Stat., ch. 111½, §§ 1021(a), 1003(o), 1003(w); Illinois Pollution Control Board Rules and Regulations, Chapter 7: Solid Waste, Rule 201.

On July 1, 1980, Pioneer applied to the Agency for a permit to construct its proposed hazardous waste disposal landfill. In late November of 1980, the Agency held two days of hearings on Pioneer's application.

The Agency has since acknowledged that this permit proceeding was governed by the "contested case" provisions of the Illinois Administrative Procedure Act. (Stipulation of March 24, 1981, C. 55-56, A.-15[2]). The statutory provisions governing such "contested cases" are set forth in Ill. Rev. Stat., ch. 127, §§ 1010-1015. These sections parallel the requirements of the due process clause and require, *inter alia:*

1. disclosure of all evidence to all parties, § 1011, § 1010(b).
2. an opportunity to respond and present evidence, § 1010(b).
3. opportunity for cross-examination, § 1012(b).
4. findings of fact, § 1011(c).
5. a prohibition against *ex parte* communications, § 1015.

The Illinois Administrative Procedure Act also provides that these procedures are *mandatory* and that agency actions *"shall be void"* if these procedures are not followed. Ill. Rev. Stat., ch. 127, § 1014. To avoid time consuming debate, the Act expressly provides that the Agency can ignore these requirements only if it obtains a written stipulation from all the parties waiving these requirements. Ill. Rev. Stat., ch. 127, § 1014,

[2] References to "A. ____" are page references to the Appendix to this Petition.

§ 1018. The Agency has acknowledged that there was never such a waiver in the Pioneer hazardous waste permit proceedings (C. 55-56, A.-15).

Despite the Agency's acknowledgment that the contested case procedural requirements of the Illinois Administrative Procedure Act applied to the Pioneer hazardous waste permit proceedings and that there had been no written waiver of these requirements, the Agency engaged in wholesale violations of the Illinois Administrative Procedure Act contested case procedural requirements and the Due Process Clause of the Fourteenth Amendment.

B.

Pioneer's December 12, 1980 *Ex Parte* Submittal

On December 12, 1980—more than two weeks after the public hearing—Pioneer filed a stack of documents containing hundreds of pages of testimony, affidavits and test data with the Agency. The Agency received this material without giving petitioners any notice of these *ex parte* materials and without giving petitioners an opportunity to cross-examine, contest or submit opposing evidence.

The December 12, 1980 *ex parte* submittal disclosed for the first time that the Agency had engaged in *prior ex parte* communications with the applicant concerning the safety and feasibility of its proposed process for eternal solidification of hazardous liquid wastes called "SolidTek". In the December 12, 1980 submittal, one of the Pioneer representatives, Jesse Conner, stated, in part:

> *Interaction with I.E.P.A.* SolidTek has presented data on a number of occasions to I.E.P.A. to pre-qualify the company and its technology for use at the Ottawa facility. Specific meetings were held on April 7 and 8 and April 13-16 of this year in Springfield for that purpose. Historic data from Chemfix was presented, as well as new data and

actual solidified samples of liquid waste from Northern Petrochemical Company, Morris, Illinois. Persons contacted included:

T.E. Cavanagh, Jr.
Manager, Land Permit Section . . . (A. 23-24).

On December 22, 1980 the Agency issued a permit to develop a hazardous waste landfill to Pioneer: a) without ever disclosing to LaSalle County the existence of these hundreds of pages of additional *ex parte* evidentiary materials (C. 35-36), and on the same day Rosemary Sinon first obtained copies of those materials (C. 27-29); b) without ever giving petitioners an opportunity to cross-examine regarding this material; and c) without ever giving either petitioners an opportunity to present rebuttal evidence. This permit was designated as No. 1980-1944-DE by the Agency.

C.

The Agency Relied on Pioneer's *Ex Parte* Submittals in Issuing the Permit

Although the Illinois Administrative Procedure Act requires the Agency to include findings of fact with its permit decision (Ill. Rev. Stat., ch. 127, § 1014), the Agency did not issue its findings of fact (C. 119-185) until March 23, 1980—more than three months *after* it issued the permit and three days *after* this suit was filed in the circuit court. In these findings the Agency admits that it relied heavily on Pioneer's *ex parte* December 12 submittal in deciding to issue a permit to Pioneer:

> 1. The Agency relied on *ex parte* affidavits contained in Pioneer's December 12 submittal to make its statutorily mandated findings regarding Pioneer's past operating practices (C. 141).[3]

[3] As part of this finding, the Agency observed that "[n]o contrary evidence was presented by the [Petitioners]" (C. 141). This

footnote continued on the following page

2. The Agency also relied on the *ex parte* December 12 submittal to make its findings regarding the need for the Pioneer hazardous waste landfill (C. 173).

In their subsequent discovery depositions, Agency employees involved in the permit decision admitted that they had relied on these—and still more—*ex parte* communications in deciding to issue the permit (C. 236-37).

For example, Terry G. Ayers, who is a Review Engineer for the Residual Management Section of the Division of Land/Noise Pollution Control, and who was primarily responsible for the technical review of the Pioneer application, admitted to numerous *ex parte* contacts with Pioneer personnel which were not reflected in the record, but which he nevertheless relied on in determining that the permit should be issued. In addition to admitting that he relied on Pioneer's December 12, 1980 submittal (Ayers Deposition, March 30-31, 1981, p. 148), Mr. Ayers admitted that he had made a trip to an Ohio site operated by the principals of Pioneer, at Pioneer's invitation, in the summer of 1980 and that he took into account what he saw at that site (*Id.*, pp. 189-195). Mr. Ayers also relied on information about the prior record of the applicants that he had obtained from the Ohio EPA by telephone, even though he had made no record of the calls (*Id.*, at pp. 119-123).

Thomas E. Cavanagh, Manager of the Residuals Management Section of the Division of Land/Noise Pollution Control of the Agency, and the Agency official responsible for the overall review of Pioneer's permit, admitted to similar reliance on numerous *ex parte* contacts and submissions (Cavanagh Deposition, March 26-27, 30, 1981). In fact, Mr. Cavanagh

---

footnote continued from the previous page

incredible statement by the Agency is a stark illustration of the reason for prohibiting *ex parte* contacts on due process grounds: obviously, it was impossible for petitioners to present any evidence in opposition to material that had never been disclosed to them.

admitted that he and other Agency employees had participated in frequent meetings with Pioneer representatives throughout the fall and winter of 1980, while Pioneer's application was pending (*Id.*, at pp. 350-357, 363-367); and that there is nothing in the record which reflects these meetings (*Id.*, at pp. 366-367).[4] Prior to Mr. Cavanagh's deposition—which took place more than three months after the permit was issued—the existence of these meetings had never been revealed to the public; and to this day, the substance of these meetings has yet to be disclosed.

D.

The Attempt to Obtain Relief From the Illinois Pollution Control Board

On January 26, 1981, petitioners and several other individuals and local governmental units petitioned the Illinois Pollution Control Board (hereinafter the "Board") for review and revocation of the permit.[5] (PCB docket No. 81-10). Among the issues raised were the Agency's constitutional and statutory violations.

Unfortunately, petitioners found that no matter how egregious the violation, the Board will not even consider constitutional or statutory Illinois Administrative Procedure Act

---

[4] These admissions were in response to questioning regarding the *ex parte* contacts disclosed in Mr. Conner's memo, included in the December 12, 1980 submittal and set forth at pp. 6-7, *supra*.

[5] Under Illinois statute, the Illinois Environmental Protection Agency conducts permit proceedings in the first instance. Ill. Rev. Stat., ch. 111½, § 1039. Aggrieved citizens can challenge the issuance of a hazardous waste permit before the Board, but such challenges are limited to "on the record" review. *Id.*, § 1040(b). Subsequent judicial review is in the Illinois appellate court, *id.*, § 1041, which reviews the same record as that reviewed by the Board—the record compiled before the Agency.

issues. The Board's holdings on this point are unequivocal, and appear both in its opinions in other cases and in the rulings of its Hearing Officer in PCB No. 81-10. In a similar though unrelated case the Board addressed the issue:

> The issue centers upon Illinois Power Company's *constitutional right* to equal protection of the law.
>
> The Board finds that it *lacks the authority to decide that question* in a proceeding pursuant to Section 40 of the Illinois Environmental Protection Act.
>
> * * *
>
> This finding of the Board does not leave Illinois Power Company without relief as it may appeal this decision to the Illinois Appellate Court or *institute an action in the Circuit Court.*
>
> *Illinois Power Company* v. *Illinois Environmental Protection Agency,* PCB No. 79-61 (Order of January 8, 1981), p. 1, (emphasis added).

Consistent with this holding, the Board's hearing officer in this case deemed constitutional or statutory procedural violations outside the scope of the proceeding:

> [T]he question of the constitutionality or the legality or anything else is, as far as I'm concerned right now, outside the problem. C. 228-29.

Moreover, because of the limited nature of the Board's review, Petitioners could not even make a record of the facts underlying their claims of constitutional and procedural violations. The Board's review of the issuance of Pioneer's permit to develop a hazardous waste landfill is governed by Ill. Rev. Stat. ch. 111-1/2 § 1040(b) which provides for an "on the record" review. In such an "on the record" review, no new or additional evidence can be adduced. The Pollution Control Board's procedural rules recognize this principle, and limit review to the record compiled by the Environmental Protection Agency:

> The hearing shall be based *exclusively on the record before the Agency* at the time the permit was issued.
>
> Illinois Pollution Control Board Procedural Rule 503(a)(2) (adopted December 4, 1980) (emphasis added).

Nevertheless, petitioners attempted to make a record of the facts underlying the Agency's constitutional and statutory violations in the Board proceeding. They issued Notices to Appear at the Board hearing directed to certain employees of the Agency involved in the issuance of the permit, including Messrs. Cavanagh and Ayers who had both admitted reliance on numerous *ex parte* contacts—which were not reflected in the record—in their determination to issue the permit. The Board's hearing officer quashed these notices, because the Board's review was only "on the record":

> . . . I am not going to require these men to appear . . . I would not permit them to testify if they did appear . . .
>
> Transcript of Pre-hearing Conference, April 2, 1981, p. 21.

Because the Board would not rule on the constitutional and Illinois Administrative Procedure Act issues, and because the petitioners were foreclosed by the Board from even making a record of the facts in support of their constitutional and statutory claims, the only avenue left to petitioners was to follow the instruction of the Board in *Illinois Power Company, supra*, and "institute an action in the Circuit Court".[6]

---

[6] Subsequent judicial review from any Board decision would be in the Illinois appellate court and, like the review before the Board, would be based on the record compiled before the Agency. Since petitioners cannot make a record before the Board of the facts underlying their constitutional and statutory claims, further appeal to the appellate court on these issues would be a futile exercise.

E.

The Suit in the Circuit Court

On March 20, 1981, petitioners filed their Verified Complaint (C.3-15) together with their Motion For Preliminary Injunction, which was accompanied by two supporting Affidavits, one by Assistant State's Attorney James Lanuti and one by J. Michael Heaton, Esq. (C. 27-29; 35-36) with the Illinois circuit court. At the time the suit was filed the trial court scheduled a hearing on the Motion For Preliminary Injunction for March 25, 1981.

On March 23, 1981 the Agency's attorney admitted that the Agency's conduct "as a whole had violated the Illinois Administrative Procedure Act" (C. 283-85). Pursuant to those representations, on March 25, 1981, prior to the hearing on the preliminary injunction, the Agency and the petitioners entered into a Stipulation (C. 55-56, A. 15) in which the Agency admitted that it had violated the Illinois Administrative Procedure Act. The material elements of the Stipulation are the following:

> 1. The County of LaSalle, Illinois, Rosemary Sinon, Michael M. Mauzy, and the Illinois Environmental Protection Agency, agree that prior to issuance of a permit for a hazardous waste sanitary landfill pursuant to § 39(c) of the Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½, § 1039(c), the Agency is required to follow the contested case procedure of the Illinois Administrative Procedure Act, Ill. Rev. Stat., ch. 127, § 1001 *et seq.*
>
> 2. In the proceedings leading to the issuance of hazardous waste sanitary landfill permit No. 1980-1944-DE (issued December 22, 1980), the requirements of the Illinois Administrative Procedure Act relating to contested cases were not followed in their entirety, and these requirements were not waived by written stipulation pursuant to Section 18 of the Illinois Administrative Procedure Act, Ill. Rev. Stat., ch. 127, § 1018.

3. Should the Court declare that the Permit No. 1980-1944-DE is therefore void pursuant to the statutory mandate of Section 14 of the Illinois Administrative Procedure Act, Ill. Rev. Stat., ch. 127, § 1014, the Illinois Environmental Protection Agency agrees to follow the contested case provisions of the Illinois Administrative Procedure Act in any future permit application proceedings with respect to the site covered by the Permit No. 1980-1944-DE. (C. 55-56, A. 15).

F.

The Preliminary Injunction

At the preliminary injunction hearing on March 25, 1980, the County of LaSalle and Rosemary Sinon had the following materials supporting their motion: 1) the Verified Complaint, 2) supporting Affidavits which spelled out in concise detail the failure of the Agency to provide notice and an opportunity for cross-examination and an opportunity to submit opposing evidence, and 3) the Agency Stipulation. The petitioners also had their affidavit witnesses ready in the courtroom and offered to put them on the stand for direct and cross-examination if the trial court deemed testimony necessary (Transcript, p. 23).

On the day of the hearing, Pioneer filed an Answer and a "Verified Statement of Facts," both of which were "verified" by Pioneer's trial counsel in this case. No affidavits were filed by Pioneer in opposition to the affidavits of Messrs. Heaton and Lanuti. At no point did Pioneer or the Agency ever dispute the following critical facts:

a. there was a December 12 submission by Pioneer of evidentiary materials to the Agency;

b. neither Pioneer nor the Agency ever gave LaSalle County notice of these materials or an opportunity to cross-examine or file opposing evidence; and

c. the Agency never filed findings of fact until three months after the permit was issued, and after this suit was filed.

Based on the material uncontradicted facts set forth in the petitioners' supporting affidavits and the Agency Stipulation, the trial court made the following determination:

> Now, I have affidavits here filed in this matter by responsible attorneys who say that they were deprived of their opportunity to cross examine witnesses and to introduce evidence in contravention to the evidence which the Board had at the time. And, though you don't agree, Mr. Immel, and I can surely understand why, I have a stipulation signed by one of the Attorney Generals of this State saying in general terms I'll agree but saying that, "The requirements of the Illinois Administrative Procedure Act relating to contested cases were not followed in their entirety and were not waived."
>
> The problem involved here is of such moment and consequence that I surely can invoke the authority of this Court to restrain the illegal act which would occur with the deprival of due process. And, I surely can invoke the power of this Court to see that what is now considered in this country to be a terrible problem environmentally, from a health standpoint, has to be guarded to the utmost.
>
> I am satisfied that there was not judicial due process and I am satisfied that the injunction should be issued.
>
> Transcript of Proceedings, March 25, 1981, p. 74.

The circuit court then entered its Preliminary Injunction, finding, *inter alia,* that by reason of the Agency's constitutional and statutory violations, the permit was void, and enjoining any reliance on the permit and any development of a hazardous waste landfill pursuant to the permit (C. 187-190, A. 10).

G.

The Post-Injunction Proceedings

On April 2, 1981, petitioners informed the Board's hearing officer of the trial court's preliminary determination. Petitioners

further advised the hearing officer that the trial court's Preliminary Injunction prevented the parties from taking any action in asserted reliance on this permit until the constitutional and Illinois Administrative Procedure Act violations could be decided on the merits.

The hearing officer denied petitioners request to continue the hearing until the trial court could decide the constitutional and Illinois Administrative Procedure Act issues on the final merits. He said: "[T]he injunction, the preliminary injunction, does not affect me in any way." (C. 228).

Petitioners brought the action of the hearing officer to the attention of the circuit court on April 6, 1981, in a Motion to Enforce Preliminary Injunction (C. 211-16). The court granted the motion and prevented any proceedings in reliance on the permit from going forward until the court entered a final decision on the merits of the constitutional and Illinois Administrative Procedure Act claims (C. 289).

Consistent with the trial court's decision that it should decide the constitutional and Illinois Administrative Procedure Act issues, and its previous holding in *Illinois Power Company, supra,* the Pollution Control Board entered its own order staying all Board proceedings until there was a final adjudication by the state court.

H.

The Illinois Appellate Court's Decision

Pioneer and the Agency took an appeal from the circuit court's denial of their motion to vacate the Preliminary Injunction (A. 8). Although respondents' appeal raised a host of issues, the Illinois appellate court decided this case solely on the basis of the issue of exhaustion of administrative remedies. The court never addressed any of the other issues before it, in-

cluding the clear violation of petitioners' constitutional and statutory rights and the indisputable merit of the Preliminary Injunction. The appellate court's analysis consisted of the following:

> The Board did not have a chance to rule on any of the plaintiffs' claims. Therefore, it is clear that the plaintiffs did not exhaust their administrative remedies. (A. 5)

By ordering the dismissal of petitioners' Complaint in the circuit court, and by requiring petitioners to proceed before the Board, the appellate court effectively deprived petitioners of any meaningful opportunity for a hearing on their claims of constitutional and statutory violations. Since the Board will not rule on the constitutional and statutory issues, and will not even allow petitioners to put the facts supporting their claims into the record, the petitioners are left without any forum in which they can prove the facts of the constitutional and statutory violations they have alleged.

I.

Proceedings Before The Illinois Supreme Court

On August 17, 1981, twenty-one days after the appellate court's decision was rendered, petitioners filed their Petition For Appeal As Of Right, Or, In The Alternative For Leave To Appeal with the Illinois supreme court; and on the same day, on petitioners' motion, the Illinois appellate court stayed its mandate pending disposition of the Petition by the supreme court.

Petitioners sought review by the Illinois supreme court on two bases. First, petitioners suggested that the appellate court had misconstrued the logic and purpose of the exhaustion doctrine in this case. The exhaustion doctrine does not apply, and the case was properly before the circuit court because: the administrative forum could not resolve the constitutional and statutory issues presented by petitioners; further administrative proceedings would be futile; and there had been a clear violation of petitioners' rights.

Second, petitioners contended that by its misapplication of the exhaustion doctrine, the appellate court had deprived petitioners of access to any forum to resolve the disputed issues of fact underlying the alleged violations of petitioners' constitutional and statutory rights; and had thereby deprived petitioners of their most fundamental right of due process. Because this issue had arisen for the first time as a result of the appellate court's decision, petitioners further contended that they were entitled to appeal as a matter of right, pursuant to Illinois Supreme Court Rule 317. Ill. Rev. Stat. ch. 110A § 317.

The Illinois supreme court denied leave to appeal in an unreported Order without opinion on October 19, 1981 (A.-1).

REASONS FOR GRANTING THE WRIT

At issue in this case is the right of citizens to have access to the courts to resolve disputed issues of fact underlying alleged violations of their constitutional and statutory rights, where there is no other forum with the power to afford the citizens relief. The context in which this issue arises—a controversy over a hazardous waste landfill—highlights the need for this Court to declare that the public has the right to a judicial hearing on such disputed facts and a remedy; and that a denial of access to the courts for such purpose is a denial of due process.

Petitioners Have a Right of Access to the Courts for a Hearing and Remedy for Violations of Their Constitutional and Statutory Rights Where No Other Forum Has the Power to Provide a Remedy

Because of the serious public health risks associated with hazardous wastes, the State of Illinois has given citizens, like petitioners, the substantive right to oppose the grant of a permit for a hazardous waste dump.

The ensure that citizens can enforce this substantive right, the Illinois legislature has required the Agency to follow the "contested case" procedures of the Illinois Administrative Procedure Act, Ill. Rev. Stat., ch. 127, § 1001, before it issues a permit. The procedural protections embodied in the "contested case" provisions parallel the requirements of the Due Process Clause of the Fourteenth Amendment: full disclosure of all evidence to all parties: an opportunity to respond and present rebuttal evidence: an opportunity for cross-examination: findings of fact: and a prohibition against *ex parte* communications.[7] The Illinois Administrative Procedure Act further provides that if these procedures are not followed, and they have not been waived in writing, agency actions *"shall be void"*. Ill. Rev. Stat., ch. 127, § 1014.

It is beyond dispute that the Agency committed egregious violations of these statutory and constitutional procedural protections in its decisionmaking process relative to the Pioneer permit. After the public hearing on the Pioneer permit, the Agency received a huge *ex parte* submittal from Pioneer. Notice of the *ex parte* submittal was never even given to LaSalle County, and none of the petitioners were given an opportunity to review this material, or cross-examine or submit rebuttal evidence before—or after—the Agency issued the permit.

This December 12, 1980 *ex parte* submittal disclosed prior *ex parte* contacts, which in turn led to testimonial admissions by Agency officials of numerous other *ex parte* communications between the Agency and Pioneer and others—all of which were relied on by Agency personnel in making the decision to issue a permit to Pioneer. All of these *ex parte* contacts were concealed from petitioners and the general public up to the time the

---

[7] *See, e.g., Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 303-04 (1937); *Cook County Federal Savings & Loan Association* v. *Griffin*, 73 Ill. App. 3d 210, 391 N. E. 2d 473 (1st Dist. 1979).

permit was issued, and to this day the full extent of these *ex parte* communications is unknown.

When petitioners sought to bring these violations before the Board, on review of the Agency's decision, the Board and its hearing officer made it clear that the Board would not rule on constitutional and statutory issues; and because the Board's review was "on the record" made before the Agency, petitioners could not even make a record of the facts underlying the claimed constitutional and statutory violations for review by the Illinois appellate court.

Petitioners then followed the direction of the Board and brought these issues to the circuit court. There, the Agency *admitted* by Stipulation that it had failed to follow the procedural requirements of the "contested case" provisions that governed the permit proceedings; and the court entered a Preliminary Injunction which contained specific preliminary findings that petitioners' constitutional and statutory rights had been violated, and therefore the permit issued to Pioneer was void.

These findings were never controverted by the appellate court. Rather, that court sidestepped the findings by misapplying the exhaustion doctrine and sending the case back to the Board. Since the Board will not rule on the statutory and constitutional issues, and will not allow petitioners to make a record of the facts supporting their claims, the petitioners are left without any forum in which they can prove the facts of the constitutional and statutory violations and obtain relief.

Simply stated, petitioners have been denied the right to prove the facts of violations of their rights and obtain a remedy. In an analogous situation, in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930), the Court held that a state court's decision depriving a litigant of a judicial remedy for the enforcement of its rights where no other remedy was available was a denial of due process, "—using that term in its primary sense of an opportunity to be heard and to defend its substantive right." 281 U. S. at 678.

Brinkerhoff-Faris' underlying claim was that the County tax assessor had made discriminatory assessments against its shareholders in violation of the equal protection clause of the fourteenth amendment. At the time the claim arose, the state tax commission, the relevant state administrative body, refused to hear such claims on the ground that it lacked the power to grant the relief sought. Accordingly, Brinkerhoff-Faris filed a bill in equity in state court seeking an injunction and other relief. The Missouri supreme court held, however, that the plaintiff should have complained to the state tax commission, and having failed to do so, its claim was barred.

When the case came before the Court on Brinkerhoff-Faris' claim that the decision of the state court had deprived it of due process, the Court described the actions of the Missouri supreme court as if it were describing the actions of the Illinois appellate court in this case:

> The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it.
>
> 281 U. S. at 679.

The Court explained its rationale for holding that denial of access to a judicial forum for a remedy when no other remedy was available is a denial of due process:

> Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the endorcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.
>
> 281 U. S. at 682 (citations and footnote omitted).

In more recent years, *Boddie* v. *Connecticut*, 401 U. S. 371 (1971) is the seminal case. Boddie challenged a Connecticut

tatute requiring payment of a filing fee as a pre-requisite to nitiating a divorce action. Because she was unable to pay the equired filing fee, Boddie was refused access to the divorce court. This Court recognized the dilemma which resulted. Because there is no non-judicial mechanism for obtaining a divorce, a plaintiff who is barred from court is barred from any possibility of obtaining a divorce.

The Court held that such exclusion from the only forum empowered to settle the dispute is a denial of due process:

> Thus, although they assert here due process rights as would-be plaintiffs, *we think appellants' plight,* because resort to the state courts is the only avenue to dissolution of their marriages, *is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes.* Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.
>
> 401 U. S. at 376-77 (emphasis added).[8]

This Court has also given broad scope to the right of citizens to have access to the courts in the context of civil rights cases. In *Wolff* v. *McDonnell,* 418 U. S. 539 (1974), which involved a civil rights action by a Nebraska prison inmate, the Court identified the right of access as a fundamental due process right:

---

[8] Just last Term, the Court unanimously confirmed the continued vitality of *Boddie*—and the principle that citizens cannot be deprived of access to a judicial forum if it is the only forum with power to resolve their dispute—in *Little* v. *Streater,* ___ U. S. ___, 101 S. Ct. 2202, 2205 and 2210 n. 10 (1981).

> The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.
>
> 418 U. S. at 579[9]

In view of this body of precedent, and particularly the *Brinkerhoff-Faris* decision, the decision of the Illinois appellate court—which deprived petitioners of access to a judicial forum to resolve the disputed issues of fact underlying alleged violations of their constitutional and statutory rights where there is no other forum which can afford petitioners a remedy—was a denial of petitioners' most fundamental due process rights.

Where, as here, the health of an entire community is at stake, such due process violations cannot be ignored. Petitioners must have access to the courts for a hearing on the disputed fact issues underlying their constitutional and statutory claims, and a remedy.

---

[9] *See also, Bounds* v. *Smith*, 430 U. S. 817 (1977).

CONCLUSION

For all the foregoing reasons, petitioners respectfully request this Court to issue a writ of certiorari to review the judgment of the Illinois appellate court, third judicial district.

Respectfully submitted,

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY; and ROSEMARY SINON

GARY PETERLIN,
State's Attorney of LaSalle County

Of Counsel:

JOSEPH V. KARAGANIS
RUSSELL R. EGGERT
Special Assistant State's Attorneys

BRUCE WHITE
O'CONOR, KARAGANIS & GAIL LTD.
130 East Madison Street
Ottawa, Illinois 61350
(815) 434-6206

150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

APPENDIX

APPENDIX

PAGE

Order of the Illinois supreme court, dated October 19, 1981, denying petitioners' leave to appeal A-1

Opinion and judgment of the Illinois appellate court, entered July 27, 1981 ..... A-2

Order of the Illinois circuit court, entered April 6, 1981, denying defendants' motion to vacate, and in the alternative to stay the preliminary injunction, and granting plaintiffs' motion to enforce the preliminary injunction A-8

Preliminary Injunction, entered by the Illinois circuit court, entered March 25, 1981 ..... A-10

Stipulation, by and between the plaintiffs and defendant Illinois Environmental Protection Agency, filed with the Illinois circuit court, March 25, 1981 ..... A-15

Verified complaint for declaratory and injunctive relief, filed with the Illinois circuit court, March 20, 1981 ..... A-18

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 19, 1981

Mr. Joseph V. Karaganis
Attorney at Law
130 E. Madison Street
Ottawa, IL 61350

No. 55378—County of LaSalle, ex rel. Gary Peterlin, etc., et al., petitioners, vs. Michael M. Mauzy, Director, Illinois Environmental Protection Agency, etc., et al., respondents. Leave to appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

CLELL L. WOODS
Clerk of the Supreme Court

Case No. 81-244
81-191 (Consolidated)

IN THE APPELLATE COURT OF ILLINOIS

Third District

A.D. 1981

COUNTY OF LASALLE, ex rel., GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY and ROSEMARY SINON,

Plaintiffs-Appellees,

vs.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; and WILLIAM CLARKE,

Defendants-Appellants,

and

WILMER and EDITH BROCKMAN,

Defendants.

Interlocutory Appeal from the Circuit Court of LaSalle County, Illinois.

—

Honorable
Leonard Hoffman,
Judge Presiding.

Mr. JUSTICE STOUDER delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of LaSalle County in favor of the plaintiffs, LaSalle County and Rosemary Sinon, and against the defendants, Pioneer Development, Pioneer Processing, Inc., William Clark [sic] and Michael Mauzy, director of the Illinois Environmental Protection Agency. The only issue before us is a procedural one and we do not express any opinion on the merits of the validity of the permit as that question is not before us. On July 1, 1980, Pioneer Development, Pioneer Processing, Inc. and William Clarke (Pioneer) filed an application with the Illinois Environmental Protection Agency (EPA) seeking a permit to construct a hazardous waste disposal site on a 177 acre site in

LaSalle County. After reviewing the application for technical adequacy, the EPA scheduled a public hearing in Ottawa on November 21 and 22 and gave public notice of the hearing. The public notice stated that the day sessions were reserved for an adversary hearing where legal counsel or other registered representatives of Pioneer or an opposition group could present expert witnesses who were subject to cross-examination. In addition, written comments for the record could be submitted during the public hearing sessions and for fourteen days after November 22.

LaSalle County and Rosemary Sinon attended the public hearings. Counsel for Sinon entered a written appearance, cross-examined Pioneer's expert witness, offered his own expert witness, filed a brief objecting to the permit and, on December 12, submitted written testimony from his expert witness. Counsel for LaSalle County did not enter a verbal or written appearance, although he did ask questions of Pioneer's expert witnesses.

On December 12, Pioneer made a written submission to the EPA. Pioneer described the submission as a rebuttal of various statements made by Sinon's expert witness plus statements responding to or clarifying questions and/or objections raised at the hearing. The plaintiffs describe it as several hundred additional pages of evidentiary material. A copy was sent to Sinon's attorney but none was sent to LaSalle County's attorney.

On December 22, the EPA issued a permit to Pioneer allowing the development of the site for hazardous waste disposal. The permit authorized only the construction of the site and specifically prohibited actual operation and disposal of hazardous waste on the site without application for and issuance of an operating permit. On January 26, 1981, the plaintiffs, along with seven other parties, filed a petition for review and revocation of the permit with the Illinois Pollution Control Board (Board). The appeal was filed pursuant to

section 40(b) of the Environmental Protection Act (Ill. Rev. Stat. 1979, ch. 111½, par. 1040(b)), which provides that the appeal be based exclusively on the record before the EPA and places the burden of proof on the petitioner. The Board considered the petition, accepted the case, and entered an order setting a public hearing on the matter for April 6.

On March 20, plaintiffs filed suit in LaSalle County seeking a declaratory judgment that the permit was void and asking for a preliminary injunction prohibiting the defendants from "undertaking, allowing or causing, in any manner, directly or indirectly, any activity to develop a hazardous waste landfill" pursuant to the permit. The complaint alleged that the Administrative Procedures Act (APA) (Ill. Rev. Stat. 1979, ch. 127, par. 1001-1021) applied to the November 21-22 hearing held by the EPA, that the provisions of the APA were violated and that therefore the permit was void. Specifically, the plaintiffs alleged that they were parties as defined in the APA and had standing to raise issues of its violation, that Pioneer's December 12 submission was an ex parte consultation as defined in the APA, that the APA gave the plaintiffs the right to cross-examine and rebut the submission, that they were denied those rights, that the EPA failed to make findings of fact and law required by the APA and that the procedures followed denied them due process of law. On March 25, 1981, Pioneer filed an answer denying all the allegations.

On the same day a hearing was held on the motion for a preliminary injunction. After hearing arguments by counsel, the court granted a preliminary injunction. Among other things, the court found that the APA was applicable, that plaintiff's due process rights were violated, and that because of the APA violations, the permit was void. Defendants moved to vacate the order or, in the alternative, for a stay. Following a hearing on April 6, the motion was denied and plaintiffs' motion to enforce the preliminary injunction was granted.

On appeal, the defendants raise five issues. The first issue is whether the circuit court should have dismissed plaintiffs' complaint because the plaintiffs failed to exhaust their administrative remedies and that therefore plaintiffs' complaint should have been dismissed. We agree.

Section 40(b) of the Environmental Protection Act states that if the EPA grants a permit to develop a hazardous waste disposal site, a third party may petition the Board within thirty-five days for a hearing. Plaintiffs initiated the Board proceedings as mandated by the statute. However, seven weeks after the proceedings were initiated and approximately two weeks before the scheduled injunctive relief. The Board did not have a chance to rule on any of the plaintiffs' claims. Therefore, it is clear that the plaintiffs did not exhaust their administrative remedies.

The question thus arises as to whether the plaintiffs need exhaust these remedies or whether they fall within an exception to the rule. Plaintiffs contend they did not have to exhaust their administrative remedies because to have done so would have been futile. Plaintiffs argue that they are alleging a violation of their constitutional right to due process and that the Board lacks jurisdiction to decide that question. Therefore, exhausting their administrative remedies would be futile.

An analogous issue was addressed in *Village of South Elgin v. Waste Management of Illinois, Inc.* (1978), 62 Ill. App.3d 815, 379 N.E.2d 349. In that case, the Village of South Elgin and the Kane County state's attorney filed suit in circuit court asking for a declaratory judgment that a landfill developmental permit was void and seeking to enjoin the permit holder from taking action under the permit. The plaintiffs had filed a challenge to the issuance of the permit and the Board had not yet ruled on the appeal. The plaintiffs alleged lack of equal protection, denial of due process and the lack of an adequate administrative remedy. The trial court dismissed the suit for failure to exhaust administrative remedies before the Board.

The appellate court affirmed and, in dealing with the issue of the alleged constitutional violations, stated "while it is true that those who seek relief from a statute on the ground that it is void in its entirety are not obliged to pursue the machinery of the statute itself for their remedy, this exception to the exhaustion doctrine can have no application where, as here, it is not contended that the statute (i.e. The Environmental Protection Act) is unconstitutional in its entirety, but merely that one provision of the statute is unconstitutional as applied to plaintiffs * * *" (62 Ill. App.3d at 822, 379 N.E.2d at 355). *See also Bulk Terminals Company v. Environmental Protection Agency* (1976), 65 Ill.2d 31, 357 N.E.2d 430.

The case at bar is similar to *South Elgin* in that the plaintiffs are not challenging the constitutionality of the entire statutory scheme. They claim that their constitutional right to due process has been violated because the provisions in the statute were not correctly applied to them. While this is not the same as claiming that the statute is unconstitutional as applied, we believe it is so similar as to require the same result as in *South Elgin.* Therefore, the plaintiffs' claim of unconstitutionality does not exempt them from the requirement of exhausting their administrative remedies.

Plaintiffs alternatively contend that there was no need to exhaust their administrative remedies because there was a clear violation of legal duty on the part of the EPA. However, we do not find any clear cut violation of the statute that would place plaintiffs in that situation.

Finally, plaintiffs claim that the EPA waived the issue of exhaustion of remedies because the EPA did not raise the issue at the trial level. The problem with this argument is that Pioneer did not waive its rights. The EPA's failure to raise an issue cannot waive Pioneer's right to raise it. Therefore, we find no waiver.

In summation, we do not find any applicable exception to the exhaustion of remedies doctrine. Because of our holding on

this issue, we need not reach the other issues raised on appeal. Since the plaintiffs failed to exhaust their administrative remedies, their complaint should have been dismissed in the circuit court. Accordingly, the judgment of the circuit court of LaSalle County is reversed and the preliminary injunction is dissolved.

Judgment reversed and preliminary injunction dissolved.

ALLOY and HEIPLE, JJ., concur.

Filed April 6, 1981
Dale L. Stockley
LaSalle County, Circuit Clerk
Thirteenth Judicial Circuit of Illinois

CIRCUIT COURT OF ILLINOIS
THIRTEENTH JUDICIAL CIRCUIT

STATE OF ILLINOIS,
COUNTY OF LASALLE, } ss.:

County of La Salle et al.
Plaintiff

vs. Docket No. 81-MR-16

Mauzy, et al.
Defendant

ORDER

THIS CAUSE coming as to be heard on all pending motions, the Court having considered all pleadings and the arguments of counsel in open Court, and being fully advised in the premises;

IT IS HEREBY ORDERED:

(1) Defendants' Motion to Vacate and in the Alternative to Stay be, and it hereby is, denied;

(2) Plaintiffs' Motion to Enforce Preliminary Injunction be, and it hereby is, granted:

(a) All parties to this cause are hereby ordered to refrain from proceeding in any way before the Illinois Pollution Control Board in cause No. PCB 81-10.

(b) The permit being void, the proceedings in No. PCB 81-10 shall not go forward until further Order of this Court

(c) This Order shall apply to all parties hereto and to the Pollution Control Board.

ate Entered: 4/6/81 Leonard Hoffman, *Judge*

Filed March 25, 1981
Dale L. Stockley
La Salle County, Circuit Clerk
Thirteenth Judicial Circuit of Illinois

STATE OF ILLINOIS
COUNTY OF LA SALLE } ss.:

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
La Salle County, Illinois—General Division

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,
Plaintiffs,

v.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,
Defendants.

No. 81-MR-16

PRELIMINARY INJUNCTION

THIS CAUSE coming on to be heard on Plaintiffs' verified Complaint for Declaratory and Injunctive Relief; Plaintiffs' Motion for a Preliminary Injunction, and the Affidavits in

support thereof by J. Michael Heaton and James Lanuti; and the Stipulation entered by Plaintiffs and Defendants Michael M. Mauzy and Illinois Environmental Protection Agency (these Defendants are hereinafter collectively referred to as "IEPA"); the Court having considered all of the pleadings herein, and having heard and considered the arguments of counsel for all parties, and being fully advised in the premises;

THE COURT FINDS:

1. That the Court has jurisdiction over the parties hereto and the subject matter hereof;

2. That on December 22, 1980, IEPA issued a certain permit, No. 1980-1944-DE (hereinafter referred to as "the permit"), to Defendants Pioneer Development, Pioneer Processing, Inc., William Clarke, and Wilmer and Edith Brockman. The permit purports to authorize development of a hazardous waste sanitary landfill on a 177-acre site in LaSalle County, Illinois.

3. Plaintiffs in this Court have challenged the validity of the permit on the grounds that IEPA issued the permit without following the procedures required by the Illinois Administrative Procedure Act, Ill.Rev.Stat., ch. 127, § 1001 *et seq.*, specifically those procedures applicable to "contested cases" as defined in that Act.

4. Plaintiffs have a reasonable likelihood of success on the merits in this case, in that:

a. IEPA permit proceedings for hazardous waste sanitary landfills are governed by the Illinois Administrative Procedure Act provisions applicable to contested cases, and the IEPA has so stipulated;

b. in the IEPA proceedings which led to the issuance of the permit the procedures required by the Illinois Administrative Procedure Act were not observed in all respects, and Plaintiffs' rights guaranteed by both the

Illinois Administrative Procedure Act and the Due Process Clauses of the Illinois and United States Constitutions were violated, in that:

i) IEPA accepted *ex parte* evidentiary submissions after the public hearings that were held during the proceedings leading to the issuance of the permit;

ii) these *ex parte* evidentiary materials were never disclosed to Plaintiff County of LaSalle before the permit was issued, and were only disclosed to Plaintiff Rosemary Sinon on the same day as the permit was issued;

iii) Plaintiffs were never given any opportunity to cross-examine or to present any opposing evidence on these *ex parte* evidentiary materials;

iv) IEPA failed to include findings of fact and conclusions of law as part of its decision to issue the permit, and did not release any findings of fact or conclusions of law until March 23, 1981, over three months after the permit itself was issued; and

v) IEPA has stipulated to the fact that there was not full compliance with the Illinois Administrative Procedure Act.

5. Plaintiffs never waived any of their rights in writing under Section 18 of the Illinois Administrative Procedure Act, and the IEPA has so stipulated.

6. Because of the violations of the Illinois Administrative Procedure Act set forth above, and because there has been no waiver of any rights under Section 18 of that Act, the permit is void pursuant to Section 14 of that Act, Ill.Rev.Stat., ch. 127, § 1014.

7. Plaintiffs have no adequate remedy at law for the violations of the Illinois Administrative Procedure Act and the Due Process Clauses set forth above, because money damages would be inadequate compensation for those violations.

8. Plaintiffs have no adequate remedy in any administrative forum, including the Illinois Pollution Control Board, in that:

a. The Pollution Control Board has held that it does not have power to consider constitutional violations and that jurisdiction to remedy such violations rests in the Circuit Court.

b. The Pollution Control Board does not have authority to grant any interlocutory relief.

c. The Pollution Control Board's authority to take any action on the permit is limited by statute to a 90-day period beginning from the filing of the administrative petition. If the Board fails to act within 90 days, the permit is issued by operation of law, and the Board is powerless to afford Plaintiffs a remedy even though the permit action by the Agency is void within the mandate of Section 14 of the IEPA.

d. Plaintiffs face the distinct threat that:

i. Plaintiffs will not have time to gather and present the full evidence of the Agency's violations within the 90-day time period which expires April 26, 1981; and

ii. even if Plaintiffs are able to complete discovery and present their case by April 26, 1981 the PCB will not have time to act within the 90-day period.

9. Issuance of a preliminary injunction will maintain the status quo.

10. A preliminary injunction is necessary to protect Plaintiffs from suffering irreparable harm, in that there is a substantial and growing likelihood that the Pollution Control Board will be unable to issue a final decision on the appeal

from the issuance of the permit, and the issuance of the permit may be deemed affirmed by operation of Section 40 of the Illinois Environmental Protection Act, Ill.Rev.Stat., ch. 111-1/2, § 1040.

11. No bond is required under the circumstances.

IT IS THEREFORE ORDERED THAT:

A. A preliminary injunction be, and it hereby is, issued enjoining and restraining Defendants, their officers, agents, servants, successors and all persons in active concert and participation with them from enforcing or otherwise relying upon Illinois Environmental Protection Agency permit No. 1980-1944-DE and from undertaking, allowing or causing in any manner, directly or indirectly, any activity to develop a hazardous waste sanitary landfill pursuant to said permit.

B. This preliminary injunction shall remain in effect until further order of this Court.

Dated: 3/25/81

Enter: Leonard Hoffman
Circuit Judge

STATE OF ILLINOIS
COUNTY OF LASALLE } ss.:

IN THE CIRCUIT COURT FOR THE
Thirteenth Judicial Circuit
LaSalle County, Illinois

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,
Plaintiffs,

v.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,
Defendants.

STIPULATION

NOW COME COUNTY OF LASALLE, ILLINOIS, ROSEMARY SINON, MICHAEL M. MAUZY, and the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, parties to the above-captioned proceeding, and hereby stipulate to the following:

1. The County of LaSalle, Illinois, Rosemary Sinon, Michael M. Mauzy, and the Illinois Environmental Protection

Agency, agree that prior to issuance of a permit for a hazardous waste sanitary landfill pursuant to § 39(c) of the Illinois Environmental Protection Act, Ill. Rev. Stat., Ch. 111½, § 1039(c), the Agency is required to follow the contested case procedure of the Illinois Administrative Procedure Act, Ill. Rev. Stat., Ch. 127, § 1001 *et. seq.*

2. In the proceedings leading to the issuance of hazardous waste sanitary landfill permit No. 1980-1944-DE (issued December 22, 1980), the requirements of the Illinois Administrative Procedure Act relating to contested cases were not followed in their entirety, and these requirements were not waived by written stipulation pursuant to Section 18 of the Illinois Administrative Procedure Act, Ill. Rev. Stat., Ch. 127, § 1018.

3. Should the Court declare that the Permit No. 1980-1944-DE is therefore void pursuant to the statutory mandate of Section 14 of the Illinois Administrative Procedure Act, Ill. Rev. Stat., Ch. 127, § 1014, the Illinois Environmental Protection Agency agrees to follow the contested case provisions of the Illinois Administrative Procedure Act in any future permit application proceedings with respect to the site covered by the Permit No. 1980-1944-DE.

COUNTY OF LASALLE AND
ROSEMARY SINON

JOSEPH KARAGANIS
One of the Attorneys for the County
of LaSalle and Rosemary Sinon

MICHAEL M. MAUZY AND ILLINOIS
ENVIRONMENTAL PROTECTION
AGENCY

MARY DRAKE
By Mary Drake, Attorney for Michael Mauzy and Illinois Environmental Protection Agency

Of Counsel:
O'CONOR, KARAGANIS & GAIL LTD.
130 East Madison Street
Ottawa, Illinois 61350
(815) 434-6206

150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905
IIIOKG34B10

STATE OF ILLINOIS
COUNTY OF LASALLE } ss.:

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
La Salle County, Illinois—General Division

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,
Plaintiffs,

v.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,
Defendants.

No. 81 MR 16

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COME plaintiffs, COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON and for their complaint state as follows:

1. Plaintiff, COUNTY OF LASALLE is a county of the State of Illinois organized pursuant to Chapter 34 of the Illinois Revised Statutes. Plaintiff ROSEMARY SINON is a citizen and property owner of LaSalle County.

2. Defendant ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (hereinafter "IEPA" or "Agency") is an agency of the State of Illinois created pursuant to Section 4 of the Illinois Environmental Protection Act (the Act). Ill.Rev.Stat., Ch. 111-½, § 1004. Defendant MICHAEL M. MAUZY is Director of the Agency.

3. Defendant PIONEER DEVELOPMENT is a partnership; Defendant PIONEER PROCESSING, INC. is an Illinois corporation; and Defendant WILLIAM CLARKE is an agent for both the partnership and the corporation. Said Defendants have announced their intention to develop a hazardous waste sanitary landfill at a 177-acre site in LaSalle County, which is owned by Defendants WILMER and EDITH BROCKMAN. (These defendants are hereinafter collectively referred as "Pioneer").

The Statutory Mandate Governing
The Agency's Decisionmaking Process

4. The Agency is designated under the Act as the official agency of the State for the issuance or denial of permits for development (i.e. construction) of sanitary landfills, including hazardous waste landfills. Ch. 111½, § 1004, § 1039.

5. The Agency's decisionmaking process leading to the decision whether to issue or deny a hazardous waste permit are governed by the Illinois Administrative Procedure Act ("IAPA"), Ill.Rev.Stat., Ch. 127, § 1003.04, and by the Due Process Clauses of the Illinois and United States Constitution because:

a. A hazardous waste permit is a "license" within the meaning of the IAPA, Ch. 127, § 1003.04.

b. A hazardous waste permit licensing proceeding is governed by the provisions of the IAPA governing "contested cases" in that the granting of a hazardous waste permit must be preceded by notice and an opportunity for hearing. Ch. 127, § 1016(a); Ch. 111½, § 1039(c).

c. The Illinois Administrative Procedure Act applies to the Illinois EPA because the Illinois EPA is an "agency" within the meaning of Ch. 127, § 1003.01 and because the provisions of the IAPA expressly apply to the Agency:

> This Act applies to *every agency* as defined herein. Beginning January 1, 1978 in case of conflict between the provisions of this Act and the Act creating or conferring power on an agency, *this Act shall control.* However if an agency has existing procedures on July 1, 1977 specifically for contested cases or licensing those existing provisions control, except that this exception respecting contested cases and licensing does not apply if the Act creating or conferring power on an agency establishes administrative procedures not covered by this Act, such procedures shall remain in effect.
>
> Ill.Rev.Stat., Ch. 127, § 1002, (emphasis added).

The Illinois Environmental Protection Agency did not have procedures of its own on July 1, 1977 for contested cases or licensing involving hazardous wastes site development permits and does not have such procedures as of the date of this complaint.

d. As an adjudicatory proceeding the rights of the parties participating in the permit decision-making proceeding are protected by the Due Process Clauses of the Illinois and United States Constitutions.

6. The IAPA and Due Process require, as part of the decision-making process, among other things:

a. all evidentiary materials be fully disclosed to the parties. Ch. 127, § 1010;

b. opponents to the permit be given the opportunity to cross-examine with respect to evidentiary materials submitted by the permit proponents. Ch. 127, § 1012(b);

c. opponents to the permit be given the opportunity to submit rebuttal testimony and evidence with respect to evidentiary materials submitted by permit proponents. Ch. 127, § 1010: and

d. *ex parte* submissions are prohibited. Ch. 127, § 1015.

7. The IAPA further requires that a decision on a permit be accompanied by findings of fact and conclusions of law. Ch. 127, § 1014.

8. The Illinois Administrative Procedure Act specifically provides that Agency action in a contested case—such as the hazardous waste permit proceeding—"shall be void" where the Agency fails to comply with the procedures mandated by the IAPA:

> A decision by an agency in a contested case under this Act *shall be void* unless the proceedings are conducted in compliance with the provisions of this Act relating to contested cases except to the extent such provisions are waived pursuant to Section 18 of the Act and except to the extent the agency has adopted its own rules for contested cases as authorized in Section 2 of this Act.
>
> Ill.Rev.Stat., Ch. 127, § 1014, (emphasis added).

Actions Of The Defendants

9. On June 20, 1980, defendants, Pioneer, Pioneer Development and Wilmer and Edith Brockman, applied for a permit to develop a hazardous waste disposal site on a 177-acre site in LaSalle County, Illinois.

10. Development of a hazardous waste landfill is illegal under the Environmental Protection Act, Ill.Rev.Stat., Ch. 111-1/2, §§ 1001 *et seq.* unless the developer has received a permit from the Illinois Environmental Protection Agency. Ch. 111-1/2, § 1003(w), 1021.

11. Defendants' proposed 177-acre hazardous waste site is located in an abandoned surface coal ("strip") mine. The strip mining operation tore away virtually all of the subsurface layers of soil and has in some locations on the site actually exposed the St. Peters Sandstone formation, which is a major subsurface aquifer for drinking water supplies throughout northern Illinois. The site is located less than 1,000 feet from eight active domestic wells.

12. Pioneer has publicly announced its intention to bury a variety of highly poisonous and toxic wastes at this site. Many of these wastes are suspected of causing genetic damage, and several are known or suspected carcinogens. Many of these poisons are known to persist in the environment for hundreds or thousands of years.

13. While Pioneer has never publicly disclosed any precise information concerning the chemical composition, concentration, longevity, or specific quantities of wastes to be buried at the site, Pioneer has said that it will bury wastes such as:

1) arsenic wastes;

2) lead wastes;

3) nickel and cadmium wastes;

4) sulphuric acid wastes;

5) chromic acid;

6) methanol;

7) manganese;

8) nitric acid wastes;

9) metal plating wastes;

10) zinc;

11) copper; and

12) hydrocarbon wastes.

14. The Agency conducted a hearing on the hazardous waste permit application on November 21 and 22, 1980.

15. At the hearing Pioneer claimed that the critical aquifer will not be subjected to leaking toxic material or contaminated rainwater because Pioneer would transform all liquid waste, leachate and contaminated rainwater into a permanently insoluble solid material by a secret process called "Solidtek." Pioneer claims that this solid will "never" release toxic, poisonous, or hazardous waste in any liquid form. Yet the data supporting this claim, if such data exist, have been submitted secretly to the Agency alone and have never been disclosed to the plaintiffs or the public. No one has ever been given an opportunity to examine, cross-examine or elicit rebuttal testimony regarding this mysterious "solidification" process.

16. Plaintiffs LaSalle County and Rosemary Sinon were parties to this permit hearing.

17. At no time was either plaintiff given an opportunity to examine the data and analyses or to cross-examine or elicit rebuttal testimony regarding the secret eternal solidification process.

18. The hearing was completed on November 22, 1980.

19. On December 12, 1980—after the hearing had been completed and without notice to the plaintiffs—Pioneer filed several hundred additional pages of evidentiary material with the Agency containing, *inter alia*, test data, affidavits, exhibits, and narrative testimonial statements regarding the Pioneer proposal. LaSalle County was never served with this material and was never given an opportunity to cross-examine or respond with respect to the statements made in this material.

20. The December 12, 1980 *ex parte* submittal also disclosed that the Agency had engaged in prior *ex parte* communications with the applicant concerning the safety and feasibility of its eternal solidification process called "Solidtek." In the December 12, 1980 submittal, one of the Pioneer representatives, Jesse Conner, stated:

Interaction with I.E.P.A. SolidTek has presented data on a number of occasions to I.E.P.A. to prequalify the company and its technology for use at the Ottawa facility. Specific meetings were held on April 7 and 8 and April 13-16 of this year in Springfield for that purpose. Historic data from Chemfix was presented, as well as new data and actual solidified samples of liquid waste from Northern Petrochemical Company, Morris, Illinois. Persons contacted included:

T.E. Cavanagh, Jr.
Manager, Land Permit Section

John Anderson
Laboratory Manager

Genevieve Shlager
Chemist

21. On December 22, 1980 the Agency issued a permit to develop a hazardous waste landfill to Pioneer: a) without ever disclosing to LaSalle County the existence of these hundreds of pages of additional *ex parte* evidentiary materials, and on the same day as Rosemary Sinon was served with copies of those materials; b) without ever giving either LaSalle County or Rosemary Sinon an opportunity to cross-examine regarding this material; and c) without ever giving either LaSalle County or Rosemary Sinon an opportunity to present rebuttal evidence. This permit was designated as No. 1980-1944-DE by the Agency.

22. The Agency's acceptance of *ex parte* communication and evidentiary material violated the Due Process Clause and violated Section 15 of the IAPA, Ch. 127, § 1015. Section 15 and the Due Process Clause expressly prohibit *ex parte* communication.

23. The Agency's acceptance of *ex parte* communication and evidentiary material also violates Sections 10 and 12 of the IAPA, Ch. 127, §§ 1010, 1012. Those sections specifically mandate that opposing parties be given an opportunity to cross-examine (§ 1012(b)) and to present evidence in response to all

evidence submitted by their opponents (§ 1010(b)). These mandated rights to cross-examination and the opportunity to submit responsive opposing evidence are also guaranteed by Due Process.

24. In addition, the Agency issued the permit on December 22, 1980 without any of the findings of fact or conclusions of law which must be made part of the permit decision in a contested case, in violation of Section 14 of the Administrative Procedure Act, Ch. 127, § 1014.

25. By reason of the Agency's failure to comply with the express procedural requirements of the Administrative Procedure Act, the permit issued by the Agency to Pioneer is void by the express mandate of that Act. Ch. 127, § 1014. *See* paragraph 8 above.

26. Plaintiffs have no adequate remedy at law or in any administrative forum for the clear violations of their rights by defendants, and any further administrative proceeding would be futile.

27. Although Plaintiffs LaSalle County and Rosemary Sinon, together with several other persons, have filed an administrative appeal to the Pollution Control Board ("PCB") from the issuance of the permit, pursuant to Section 40(b) of the Illinois Environmental Protection Act, Ill. Rev. Stat., Ch. 111½, § 1040(b), this administrative appeal will not provide the full and complete relief necessary to protect the rights of LaSalle County and its citizens and Rosemary Sinon for the following reasons:

a. The Pollution Control Board has held that it does not have power to consider constitutional violations and that jurisdiction to remedy such violations rests in the Circuit Court.

b. The PCB does not have authority to grant any interlocutory relief.

c. The Pollution Control Board's authority to take any action on the permit is limited by statute to a 90-day period beginning from the filing of the administrative petition. If the Board fails to act within 90 days, the permit is issued by operation of law, and the Board is powerless to afford plaintiffs a remedy even though the permit action by the Agency is void within the mandate of Section 14 of the IAPA.

d. The Agency is resisting and delaying plaintiffs' discovery in the PCB proceeding and plaintiffs face the distinct threat that:

i. plaintiffs will not have time to gather and present the full evidence of the Agency's violations within the 90-day time period which expires April 26, 1981; and

ii. even if plaintiffs are able to complete discovery and present their case by April 26, 1981 the PCB will not have time to act within the 90-day period.

28. The only forum available to plaintiffs which can fully develop the facts of the Agency's violations of the United States and Illinois Constitutions and the IAPA, and obtain complete and effective relief is the Circuit Court of LaSalle County.

WHEREFORE, Plaintiffs LASALLE COUNTY and ROSEMARY SINON pray that this Court grant the following relief in their favor and against defendants to prohibit any action on the void permit in violation of the Illinois Administrative Procedure Act and the Due Process Clause:

1. A preliminary injunction, enjoining and restraining defendants, their officers, agents, servants, successors and all persons in active concert and participation with them from enforcing or otherwise relying upon permit No. 1980-1944-DE and from undertaking, allowing or causing in any manner, directly or indirectly, any activity to develop a hazardous waste landfill pursuant to said permit.

2. A Declaratory Judgment of this Court:

a. that the Illinois Environmental Protection Agency's permit proceedings for hazardous waste landfills are governed by the Illinois Administrative Procedure Act;

b. that the Agency's conduct of the permit proceedings in Permit Application No. 1980-1944-DE in accepting *ex parte* evidentiary submissions both before and after the November 21-22, 1980 hearing and in failing to disclose these materials to LaSalle County and to give LaSalle County an opportunity to cross-examine and present opposing evidence on these materials violated the mandatory requirements of the Illinois Administrative Procedure Act;

c. that the Agency's failure to include findings of fact and conclusions of law as part of its decision to grant permit No. 1980-1944-DE violated the mandatory requirements of the Illinois APA;

d. that the Agency's failure to follow the mandated procedures of the Illinois Administrative Procedure Act renders the Agency's permit No. 1980-1944-DE void as expressly mandated by § 1014 of the Illinois Administrative Procedure Act, Ill.Rev.Stat., ch. 127, § 1014; and

e. that the Agency's conduct in receiving *ex parte* evidentiary material without notice and without giving opposing parties an opportunity to cross-examine and submit opposing evidence also violated the Due Process Clauses of the Illinois and United States Constitutions and that Permit No. 1980-1944-DE is also void for this reason.

3. A permanent injunction, enjoining and restraining defendants, their officers, agents, servants, successors, and all persons in active concert and participation with them, from relying and/or otherwise enforcing any Agency hazardous waste permit, including Permit No. 1980-1944-DE, unless and

until plaintiffs and any other parties opposing the issuance of the permit are given reasonable notice and an opportunity for an adjudicatory hearing conducted in strict accordance with Due Process and with the procedures for contested cases required by and appearing in the Illinois Administrative Procedure Act, Ill.Rev.Stat., Ch. 127, § 1001 *et seq.*

4. For such other relief as this Court deems appropriate.

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON Plaintiffs

By GARY L. PETERLIN
State's Attorney of
La Salle County

JOSEPH V. KARAGANIS
Joseph V. Karaganis

STATE OF ILLINOIS
COUNTY OF LASALLE } ss.:

VERIFICATION

I, James Lanuti, being first duly sworn on oath, depose and state as follows:

1. I am an attorney duly licensed to practice law in the State of Illinois, and am a duly appointed and sworn Assistant State's Attorney for LaSalle County, Illinois.

2. In that capacity I represented LaSalle County in proceedings before the Illinois Environmental Protection Agency in which the defendants, Pioneer Development, Pioneer Processing, Inc., William Clarke, and Wilmer and Edith Brockman, were issued permit No. 1980-1944-DE to develop a hazardous waste landfill in LaSalle County.

3. I have read the complaint in this case. From my personal knowledge as attorney of record in the proceedings before the Illinois Environmental Protection Agency I know that the factual allegations concerning the conduct of those proceedings as they relate to plaintiff LaSalle County contained in the complaint are true and correct in substance and in fact.

Further Affiant sayeth not.

_____
Affiant

SUBSCRIBED AND SWORN TO before me this day of March, 1981.

_____
Notary Public

STATE OF ILLINOIS }
COUNTY OF COOK } SS.:

VERIFICATION

I, J. Michael Heaton, being first duly sworn on oath, depose and state as follows:

1. I am an attorney duly licensed to practice law in the State of Illinois.

2. In that capacity I represent Residents Against Polluted Environment, Rosemary Sinon, Marie Madden, and Joan Benya Bernabei in a proceeding before the Pollution Control Board entitled *County of LaSalle, et al. v. Illinois Environmental Protection Agency*, PCB No. 80-10. I had previously represented the latter three individuals in the proceedings before the Illinois Environmental Protection Agency in which the defendants, Pioneer Development, Pioneer Processing, Inc., William Clarke, and Wilmer and Edith Brockman, in this case were issued permit No. 1980-1944-DE to develop a hazardous waste landfill in LaSalle County.

3. I have read the complaint in this case. From my personal knowledge as attorney of record in the proceedings before the Illinois Environmental Protection Agency I know that the factual allegations concerning the conduct of those proceedings as they relate to plaintiff Rosemary Sinon contained in the complaint are true and correct in substance and in fact.

Further Affiant sayeth not.

J. MICHAEL HEATON
Affiant

SUBSCRIBED AND SWORN TO
before me this 20th day of March,
1981.

SANFORD GAIL
Notary Public

Of counsel:

Joseph V. Karaganis
Russell R. Eggert
O'Conor, Karaganis & Gail Ltd.
130 East Madison Street
Ottawa, Illinois 61350
(815) 434-6206

150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905
ILAS4A1

Opposition

No. 81-894

Office - Supreme Court, U.S.
FILED
DEC 11 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1981

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,

Petitioners,

vs.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, THIRD JUDICIAL DISTRICT

THOMAS J. IMMEL
Attorney for Respondents
Pioneer Development,
Pioneer Processing, Inc.
and William Clarke

Of Counsel:
THOMAS J. IMMEL
Burditt and Immel
741 South Grand West
Springfield, IL 62704
(217) 789-1414

LEE K. ZELLE
741 South Grand West
Springfield, IL 62704
(217) 528-3464

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

QUESTION PRESENTED

Do the facts of this case present special and important reasons for the Court to exercise its discretion and grant the petition for writ of certiorari?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Environmental Protection Agency Permit/Hearing Process	2
B. Pollution Control Board Permit Appeal	5
C. LaSalle County Circuit Court Suit and Pleadings	5
D. March 25 Circuit Court Hearing and Order	9
E. The Board Pre-Hearing Conference	11
F. Motion to Enforce and April 6 Circuit Court Order	14
G. Appellate Court Proceedings	15
H. Proceedings Before the Illinois Supreme Court	17
REASONS FOR DENYING THE WRIT	18
I. This case does not fall within the criteria enumerated in Supreme Court Rule 17.1 as special and important reasons for granting a writ of certiorari	18
A. This case does not fall within the criteria of Rule 17.1(a) or (b)	18
B. This case does not fall within the criteria of Rule 17.1(c)	19

Page

II. Petitioners' Contention That They Had No State Forum For Presentation of Due Process Issues is Legally and Factually Incorrect 21

A. The Illinois Pollution Control Board has not ruled that it will not consider constitutional issues presented by this case 21

B. Even if the Board declines to decide the due process issue, Petitioners are not denied a state court forum 23

C. Petitioners' allegations that the Board would not allow them to make a record on constitutional issues is inaccurate and misleading 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page

Boddie v. Connecticut, 401 U.S. 371 (1971) 20

Bounds v. Smith, 430 U.S. 817 (1977)..... 20

Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 19, 21

Bulk Terminals v. Environmental Protection Agency, 65 Ill. 2d 31, 357 N.E. 2d 430, 2 Ill. Dec. 263 (1976) 24, 25

Illinois Power Company v. Illinois Environmental Protection Agency, ___ PCB Opinions ___ (PCB No. 79-61, Interim Order of January 8, 1981) 21-25, A-1

LaSalle County, et al v. Illinois Environmental Protection Agency, et al, ___ PCB Opinions ___ Interim Orders of February 5 and March 5, 1981..... 23, A-3, A-4

Little v. Streater, ___ U.S. ___ 101 S. Ct. 2202 (1981) 20

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937) 20

Wolff v. McDonnell, 418 U.S. 539 (1974) 20

STATUTES

Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½, §§1001, *et seq.* ..... *passim*
§1039(c) 2
§1040(b)..... 5, 23
§1041 23-24

Illinois Administrative Procedure Act, Ill. Rev. Stat., ch. 127, §§ 1001-1021 ..... *passim*
§1014 ..... 6, 11
§1015 6

Page

Illinois Administrative Review Act, §11, Ill. Rev. Stat., ch. 110, §274 24

United States Supreme Court Rule 17.1, 28 U.S.C.A. Supreme Court Rule 17.1 18-21

RULES AND REGULATIONS

Illinois Pollution Control Board Procedural Rule 308(e) 25, 26, A-8, A-9

Illinois Pollution Control Board Procedural Rule 316 ..... 25, A-7

APPENDIX

Page

Interim Order of the Illinois Pollution Control Board, *Illinois Power Company v. Illinois Environmental Protection Agency*, PCB No. 79-61, January 8, 1981 ..... A-1

Interim Order of the Illinois Pollution Control Board, *County of LaSalle, et al v. Illinois Environmental Protection Agency, et al.*, PCB No. 81-10, February 5, 1981 ..... A-3

Interim Order of the Illinois Pollution Control Board, *County of LaSalle, et al v. Illinois Environmental Protection Agency, et al.*, PCB No. 81-10, March 5, 1981 ..... A-4

Illinois Pollution Control Board Procedural Rule 316 .... A-7

Illinois Pollution Control Board Procedural Rule 308 .... A-8

No. 81-894

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1981

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,

Petitioners,

vs.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, THIRD JUDICIAL DISTRICT

Respondents PIONEER DEVELOPMENT, PIONEER PROCESSING, INC., a corporation[1], and WILLIAM CLARKE, file their Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners COUNTY OF LA SALLE and ROSEMARY SINON and, for the reasons set forth below, respectfully pray that said Petition be denied by this Court.

[1] Rule 28.1 Statement. Pioneer Processing, Inc. is an Illinois Corporation. As defined in Section 1504 of the Internal Revenue Code (26 U.S.C.A. §1504) Pioneer does not have a parent corporation, does not have any subsidiary corporations, and does not have any affiliates.

STATEMENT OF THE CASE

This case does not involve particularly complicated or significant questions of law. The Statement submitted by Petitioners is inaccurate and misleading, as were their prior submissions to the Illinois Appellate and Supreme Courts.

In the interests of accuracy, Respondents submit the Statement of Facts from their Appellate Court brief, with addendums describing the Appellate and Illinois Supreme Court proceedings and more fully describing the Pollution Control Board pre-hearing conference. The Appellate Court placed substantial reliance on Respondents' Statement, incorporating major portions in its opinion.

Because the actual facts in the case are essential to a proper understanding of the case, and because the two Statements submitted to this Court vary significantly, Respondents have requested the Clerk of the Illinois Supreme Court to certify the record of the case and transmit the record to this Court.

A. ENVIRONMENTAL PROTECTION AGENCY PERMIT/HEARING PROCESS

On July 1, 1980, Respondents PIONEER DEVELOPMENT, PIONEER PROCESSING, INC., and WILLIAM CLARKE ("Pioneer") filed an application with Co-Respondent Illinois Environmental Protection Agency ("Agency" or "EPA") seeking a permit to construct a hazardous waste disposal site on a 177-acre site in LaSalle County, Illinois. (C. 6).

After reviewing the application for technical adequacy, the Agency scheduled a public hearing in Ottawa on November 21 and 22, as required by Section 39(c) of the Illinois Environmental Protection Act (Ill. Rev. Stat., Chap. 111½, Section 1039(c)) and gave public notice of the hearing.

The public notice of the hearing stated:

> The public hearing will be divided into two parts: the day sessions will be reserved for an adversary hearing where legal counsel or other registered representatives of Pio-

> neer Properties or an opposition group may present expert witnesses who will be subject to cross-examination by the other side. Individuals commenting during the evening session will be limited to 7 minutes each, but they will not be subject to cross-examination. In addition, *written comments for the record can be submitted* during all public hearing sessions and for *14 days after November 22, 1980.* Oral and written testimony will be accepted on the appropriateness of the Pioneer Properties site for the treatment and disposal of solid waste, including special and hazardous wastes.
>
> Persons, groups and legal counsel or representatives may register to testify by sending the name, address and telephone number to John Rein . . . (C. 95). (Emphasis added)

Petitioners LASALLE COUNTY and ROSEMARY SINON attended the public hearings.

Counsel for Petitioner SINON entered a written appearance (C. 285), extensively cross-examined Pioneer's expert witnesses, offered Eric Zimmerman, an engineer, as his expert witness, filed a final brief objecting to the permit, and on December 12, submitted further written testimony from Mr. Zimmerman. (C. 50-51).

Counsel for Petitioner LASALLE COUNTY did not enter a written or verbal appearance, object to the issuance of the permit or submit a brief. He did ask questions of Pioneer's expert witnesses. (C. 10).

At the beginning of the hearing, the Hearing Officer, in the presence of Petitioners' attorneys, stated the procedure to be followed and stated:

> We intend to close the record on Friday, December 12, and we will receive comments in written narrative form, letters, data, petitions, technical reports and so forth up to and through December 12. Then we will consider all the information we have received and by statute we have to reach our decision as to whether or not the application should be granted or denied by no later than December 28.

Later in the proceedings an attorney for a third party protested about the alleged short time to prepare for the hearing. The Hearing Officer ruled that the required notice had been given and stated,

> The record will also remain open till December 12 and any evidence you wish to submit, data, information, anything else, it's your right to do so until that time. I would remind everyone else on that point, as well.

Petitioners' attorneys did not object to this procedure during their opportunity to make opening remarks, when they were given the floor to question Pioneer's witnesses or when Mrs. Sinon's attorney presented his case. Neither Petitioner at any time raised the question of the applicability of the Illinois Administrative Procedures Act ("APA") (Ill. Rev. Stat., Chap. 127, §1001-1021). At the close of the hearing, Mrs. Sinon's attorney stated that if Pioneer is "subsequently to submit any other data, I would reserve the ability to cross-examine them on the presubmitted data"; however, he made no motion asking the Hearing Officer to keep the record open past December 12 to allow rebuttal and made no request that Pioneer notify him of its intentions to make post hearing submittals. (C. 49-50).

On December 12, the date of the close of the record, and pursuant to the rules set by the Hearing Officer, Pioneer made a written submission ("December 12 submission") to the Agency. Pioneer described this submission as "rebuttal of various statements and allegations by Dr. Zimmerman, plus statements responding to or clarifying questions and/or objections raised at the hearing." (C. 105) Petitioners describe it as "several hundred additional pages of evidentiary material . . . containing test data, affidavits, exhibits and narrative testimonial statements." (C. 9).

This submission was not introduced into evidence in the Court below.

An informational copy was sent to Petitioner Sinon's attorney since he submitted post-hearing evidentiary material on De-

cember 12 and had objected to the permit. A copy was not sent to Petitioner LaSalle County's attorney since he did not object to the permit, made no post-hearing submission and had not requested a copy. (C. 58-59).

On December 22, the Agency issued a permit to Pioneer, allowing the development of the site for hazardous waste disposal. The permit authorized only the construction of the site and specifically prohibited actual operation and disposal of hazardous waste on the site without application for and issuance of an "operating" permit. (C. 99).

B. POLLUTION CONTROL BOARD PERMIT APPEAL

On January 26, 1981, Petitioners, along with seven other parties, filed a Petition for Review and Revocation of Permit (C. 62-98) with the Illinois Pollution Control Board ("Board" or "PCB").

The permit appeal was filed pursuant to §40(b) of the Environmental Protection Act (Ill. Rev. Stat., Chap. 111½, §1040(b)), which provides that the appeal shall be "based exclusively on the record before the Agency" and places the burden of proof on the petitioner.

The Board promptly considered the petition, accepted the case ("PCB 81-10") and entered an Order on February 5 directing that a hearing be held. The Order noted that the Board was required by law to make a decision by April 26. A hearing officer was appointed and he entered an order on February 20 setting a public hearing in the matter on April 6. (C. 100-101).

C. LASALLE COUNTY CIRCUIT COURT SUIT AND PLEADINGS

On March 20, 17 days before the scheduled Board administrative hearing, Petitioners filed suit in LaSalle County seeking a Declaratory Judgment (C. 3-15) that the permit was void and asking for a preliminary injunction prohibiting the defendants

from "undertaking, allowing or causing in any manner, directly or indirectly, any activity to develop a hazardous waste landfill" pursuant to the permit.

The Complaint alleged that the APA applied to the November 21-22 hearing held by the Agency, that the provisions of the APA were violated and that, under the terms of the APA, the permit was void. (Chap. 127, §1014). Specifically, they alleged that Petitions were parties as defined in the APA and had standing to raise issues of its violation, that Pioneer's December 12 submission was an "ex parte" consultation as defined in Section 15 (Chapter 127, §1015) of the APA; that the APA gave Petitioners the right to cross-examine and rebut this submission; that they were denied these rights; and that the Agency failed to make findings of fact and conclusions of law as required by the APA. (Chap. 27, §1014). Petitioners also alleged that the procedures followed denied them due process of law as defined by the Illinois and United States Constitutions.

The Complaint further alleged that Petitioners had no adequate remedy at law or in any administrative proceeding because the Board would not rule on constitutional issues, that the Agency was resisting and delaying discovery, and that Petitioners "face the distinct threat" that the Board would not rule in the permit appeal case within the statutory 90-day limit.

The Motion for Preliminary Injunction was unverified. It was accompanied by Affidavits (C. 27-29, 35-36) by the attorneys for Petitioners who attended the November 21-22 hearings. The Affidavits stated that they had attended the hearings; had no advance notice of Pioneer's December 12 submission; never received the submission (LaSalle County) or received it the day the permit was issued (Mrs. Sinon); did not have the opportunity to cross-examine or rebut the submission; and had never received findings of fact or conclusions of law from the Agency. Neither Affidavit attempted to verify any other facts alleged in the Motion.

Petitioners' pleadings did not allege that any action taken by Pioneer or the Agency in any way violated the hearing procedures set forth in the public notice or announced by the hearing officer during the hearing.

On March 25, Pioneer filed a verified Answer to the Complaint (C. 57-59), a verified Statement of Facts in Response to Motion for Preliminary Injunction (C. 99-185), a Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction (C. 39-47), a verified Motion to Dismiss Declaratory Judgment Action (C. 60-98), and a verified Affirmative Defense to Complaint for Declaratory and Injunctive Relief. (C. 43-54).

The verified Answer specifically denied: that the APA applied to the November 21-22 hearings; that the permit was void; that Petitioners were "parties" to the November 21-22 hearings; that the December 12 submission was an "ex parte" consultation; that Petitioners had and were denied the right of cross-examination and rebuttal with respect to the December 12 submission; or that the due process clause had been violated.

The Answer further denied that the Board proceeding was an inadequate remedy at law, that the Agency had resisted or delayed discovery or that there was a distinct threat that the Board would fail to take final action within the 90-day limit.

Pioneer's verified Statement of Facts showed by uncontroverted evidence that the Board has been aware of the 90-day deadline since the case commenced, that it has repeatedly reminded the parties of the deadline and that it has never given any indication that it would fail to rule by the statutory deadline. (C. 100-103)

This pleading further showed that Petitioners did not initiate any discovery until the 22nd day of the appeal period and that this discovery was promptly responded to. On the 43rd day of the appeal, Petitioners attempted to secure the depositions of certain Agency personnel without following Board Regulations governing the taking of depositions. On the 50th day of the appeal, Petitioners followed the appropriate procedures to secure depositions and depositions were scheduled commenc-

ing four days later. Petitioners then failed to appear for their depositions. (C. 101)

While Petitioners pled no facts showing that they would suffer irreparable damage if the preliminary injunction were not granted, Pioneer pled verified facts showing that it had already invested over three-quarters of a million dollars in developing the project, would suffer continuing losses if the injunction were granted, and, if litigation were protracted, could miss the 1981 construction season and lose substantial expected operating revenues during 1981-82. (C. 100)

The Findings of Fact were issued by the Agency on March 20 and received by attorneys for Petitioner LaSalle County on March 24. (C. 102)

The LaSalle County action was identical to the pending Board proceedings, with the following exceptions:

(a) All legal issues raised in the LaSalle County case had already been raised in the Board proceeding; however, Petitioners in the Board case also attacked the permit on the following additional grounds: that the Agency "illegally used secret rules of decision", "illegally issued a supplemental permit", "illegally issued a new developmental permit", "illegally waived the requirements of Rule 316", "failed to meet its duty to affirmatively protect the public health and environment", violated provisions of the Environmental Protection Act prohibiting location of a site within 1½ miles of a municipality or within 1000 feet of a private well, and finally, that development of the site violated the U.S. Resources Conservation and Recovery Act of 1976. (82 U.S.C.A. 6901, et seq.) (C. 61, 68, 70-74).

(b) Seven petitioners in the Board case (the Village of Naplate, the City of Ottawa, the Village of Utica, Ottawa Township Board of Trustees, Residents Against Polluted Environment, Marie Madden and Joan Benya Bernabei) did not join this suit, would not have been bound by any

decision in the LaSalle County case if Pioneer prevailed and were free to pursue the Board action and the additional grounds raised therein. (C. 62)

(c) An additional defendant, Michael Mauzy, the Agency Director, was added in the LaSalle County case.

Two of the named defendants in this case are Wilmer Brockman and Edith Brockman. Summons (C. 199-199A) was returned by the LaSalle County Sheriff indicating that personal service at their place of abode had been perfected on March 23 by service on their 27-year-old married daughter, Judy Brockman Daniels, at 381 Market, Seneca, Illinois. However, on March 25, Mrs. Daniels' husband, Rickie Daniels, filed a Motion to Quash Service of Summons (C. 191-193). In an attached affidavit, he stated that summons for Wilmer and Edith Brockman, who live at 381 Hossack, Seneca, was served on him at his residence at 381 South Market Street. The affidavit stated that Wilmer and Edith Brockman did not reside at 381 Market and had never resided there. It further stated that the Brockmans had been out of the State since December.

D. MARCH 25 CIRCUIT COURT HEARING AND ORDER

Attorney Craig Armstrong of Ottawa was present at the beginning of the March 25 hearing and stated that he could not and was not appearing for Mr. Brockman, who had not been served. The Court acknowledged that Mr. Armstrong had not filed an appearance and suggested that Mr. Armstrong leave the proceedings (March 25, R. 7-8). The fact that the Motion to Quash had been filed and that it appeared that the Court did not have jurisdiction over the Brockmans was called to the Court's attention before it ruled on the Preliminary Injunction. The Court replied, "I'm not going to worry about the Brockmans at this point. If they have some rights that need protected they can come into this Court and get them but today isn't the day." (March 25, R. 71-73).

On March 25, Petitioners and the Agency filed a Stipulation (C. 55-6) that purported to stipulate to certain legal conclusions, i.e. that the APA applied to the November 21-22 hearings and that the provisions of the APA were not followed in their entirety. The Stipulation did not specify how the Act was violated or give any further legal conclusions as to the effect of the purported violations. Pioneer and other defendants did not join in the Stipulation and questioned the relevance of a stipulation as to conclusions of law. (March 25, R. 25).

The Agency also filed an Answer to the Motion for Preliminary Injunction (C. 38), denying all allegations of the Motion not inconsistent with the Stipulation.

On March 25th, five days after Petitioners' Complaint was filed, a hearing was held before the Honorable Leonard Hoffman on the unverified Motion for Preliminary Injunction. No witnesses were presented by either party, nor was any documentary evidence introduced. The only evidence before the Court were the verified statements in Petitioners' Complaint (C. 3-15) and Affidavits (C. 27-29, 35-36) and Pioneer's Answer (C. 57-59), Motion to Dismiss (C. 60-98), Statement of Facts (C. 99-185) and Affirmative Defenses (C. 48-54).

As stated before, every material fact in Petitioners' verified pleadings were controverted by Pioneer's verified pleadings.

After hearing arguments of counsel, the Court signed a Preliminary Injunction (C. 186-190) presented by Petitioners. Among other things, the Court found:

> 4a. IEPA permit proceedings for hazardous waste sanitary landfills are governed by the Illinois Administrative Procedure Act provisions applicable to contested cases, and the IEPA has so stipulated;
>
> 4b. In the IEPA proceedings . . . Plaintiffs' rights guaranteed by both the Illinois Administrative Procedure Act and the Due Process Clauses of the Illinois and United States Constitutions were violated . . .

6. Because of the violations of the Illinois Administrative Procedure Act set forth above, and because there has been no waiver under Section 18 of that Act, the permit is void, pursuant to Section 14 of that Act, Ill. Rev. Stat., Ch. 127, Sec. 1014.

Based on those findings, the Court Ordered:

A. A preliminary injunction be, and it hereby is, issued enjoining and restraining Defendants, their officers, agents, servants, successors and all persons in active concert and participation with them from enforcing or otherwise relying upon Illinois Environmental Protection Agency permit No. 1980-1944-DE and from undertaking, allowing or causing in any manner, directly or indirectly, any activity to develop a hazardous waste sanitary landfill pursuant to said permit.

B. This preliminary injunction shall remain in effect until further order of this Court.

E. THE BOARD PRE-HEARING CONFERENCE

On April 2, the Board hearing officer held a preliminary conference for PCB 81-10, the pending administrative review hearing initiated by Petitioners and seven other parties.

In his preliminary remarks, the hearing officer said:

> Now, since I have no judicial power whatsoever—I am strictly a hearing officer, you might say a referee, to conduct the meeting—I do not pass any judgment on anything except procedural matters. (C. 219)

Petitioners informed the hearing officer of the preliminary injunction entered by the Circuit Court on March 25th. They suggested that the "findings" of the preliminary injunction rendered the PCB case moot and that Pioneer would be violating the preliminary injunction by even participating in the PCB hearing. On that basis, Petitioners moved for a continuance of the April 6 hearing. (C. 224-27).

The hearing officer indicated that he could not delay the hearing, stating:

> I was not a party; therefore, the injunction, the preliminary injunction, does not affect me in any way. And it is my understanding in 20 odd years of legal practice that where you are dealing with an administrative procedure, generally speaking, the courts have held that the administrative remedies must be exhausted before legal remedies become a point of question. And I say that strictly for this reason and to make this point: Now, going back to the question of what is going to happen on Monday and/or Tuesday—Monday I hope we'll be finished—we are constrained by law to take these actions within a very tight time frame unless we can get the unanimous consent of all the parties to waive these time constraints. And when you're dealing with this many parties, this becomes a very serious problem. This is the reason why on your first motion to delay the Monday hearing, I have advised you that I—because of my own constraints, I couldn't delay it unless you could come up with unanimous consent from everybody else.
>
> Now—let me finish my argument, please. Just a moment. Now, it is my position that basically the PCB hearing is a hearing on the record that was made before the agency. Now, the question of the constitutionality or the legality or anything else is, as far as I'm concerned right now, outside the problem. (C. 228-29).

Petitioners had served three Agency employees with Notices to Appear at the April 6 hearing. The Agency filed a Motion to Quash the Notices on the basis that the hearing was being held 150 miles from their place of employment and this was an unreasonable burden. The hearing officer indicated that he would grant the Motion because the employees could have been questioned or called at the November 21-22 public hearings. The hearing officer said:

> I am going to make this suggestion with regard to these Notices to Appear: I am not going to require these men to appear. I will make—I will officially make the ruling on Monday. I wish you would renew your request on Monday.
>
> They have received the Notices, but I will tell you in advance, I am not going—I would not permit them to testify if they did appear for the simple reason that they were present, they were available before all agency matters, and—now, just a minute before—before you get way off base here. Let me complete.
>
> I will permit you as the attorney—as the attorney requesting this on the basis of the information that you acquired from your deposition to state as a matter of record at the hearing on Monday what you believe these men would have testified if they were to be at the hearing. . . . Basically a proffer of proof for the record. (C. 237).

In addition to letting Petitioners make an offer of proof, the hearing officer suggested that Petitioners submit written interrogatories to the Agency personnel. The Agency attorney then stated:

> I have offered counsel the possibility of discussing a stipulation which would stipulate, in essence, that if certain questions were asked, certain answers would be given while preserving my right to make those objections I feel were quite proper in this case and in this review.
>
> And I gather that they're not much interested in that particular approach. But I think in terms of an interrogatory and so far as we could work out a mechanism which I feel would protect the legal rights of the agency in this particular matter, we would certainly be willing to attempt to work that out. (C. 248).

After some further discussion, the hearing officer summarized his position:

> Now, it is for this reason that I would permit stipulations. And you can include in your written interrogatories and questions for stipulations—you can include the questions that they were not permitted to answer on depositions. You see, I could not rule on the admissibility of it anyway. And this provides a guideline for the Board in evaluating the evidence that is submitted.
>
> But I do not feel that where the witnesses were available, they were there, or they could have been there; they were available at the time of the agency hearing—you're going far outside the record to call them at this hearing. This is the reason for my ruling. (C. 262).

F. MOTION TO ENFORCE AND APRIL 6 CIRCUIT COURT ORDER

On April 3, Petitioners filed an unverified Motion to Enforce Preliminary Injunction (C. 211-274) in the Circuit Court. At Petitioners' request, their Motion and Pioneer's pending Motion to Vacate were set for hearing before Judge Hoffman at 9:00 a.m. on April 6, one-half hour before the PCB hearing.

The Motion to Enforce requested the Court to enjoin Pioneer and other defendants and "all persons acting in concert with Defendants or who have knowledge of the Court's Preliminary Injunction from proceeding further with administrative proceedings before the Illinois Pollution Control Board in case No. PCB 81-10 . . . until further order of this Court." (C. 215).

In support of their motion, Petitioners argued that (1) the court had already ruled the permit void and (2) if Pioneer and other defendants participated in PCB No. 81-10 they would violate the Preliminary Injunction against "relying" on the permit. (C. 212).

Affidavits relating to the earlier Stipulation (C. 55-56) between the Agency and the Petitioners were filed by Pioneer (C. 286-288) and Petitioners (C. 283-285) on April 6.

On April 6, a hearing on pending Motions was held before Judge Hoffman. As on March 25, no witnesses testified and no documentary exhibits were introduced into evidence.

After hearing arguments of counsel, Judge Hoffman entered the following Order (C. 289):

> (1) Defendants' Motion to Vacate and in the Alternative for Stay be, and it hereby is denied;
>
> (2) Plaintiffs' Motion to Enforce Preliminary Injunction be, and it hereby is, granted:
>
> (a) All parties to this cause are hereby ordered to refrain from proceeding in any way before the Illinois Pollution Control Board in cause No. PCB 81-10.
>
> (b) The permit being void, the proceedings in No. PCB 81-10 shall not go forward until further Order of this Court.
>
> (c) This Order shall apply to all parties hereto and to the Pollution Control Board.

Petitioners at no time in these proceedings (1) attempted to join the Board as a party to the proceedings or (2) gave notice to the Board of the filings of the initial pleadings, the Preliminary Injunction or the Motion to Enforce.

No evidence was submitted at any time during these proceedings to show that the Board was in active concert or participation with any Defendants and received actual notice of the order.

G. APPELLATE COURT PROCEEDINGS

Pioneer filed Notice of Interlocutory Appeal with the trial court on April 9, 1981.

Pioneer's appellate brief asked that the trial court's decisions granting the preliminary injunction be reversed and that the case be dismissed. Pioneer presented five major arguments justifying reversal:

1. The Petitioners failed to exhaust their administrative remedies.

2. The Petitioners did not establish the indispensible prerequisites for a preliminary (or permanent) injunction.

3. The trial court erred in going forward without an indispensible party.

4. Pioneer was denied due process of law because the court below decided an ultimate issue of law and fact, denied Pioneer a hearing on the merits and based its preliminary injunction on this finding.

5. Pioneer was denied due process of law by the April 6th order in that it wrongfully interferred with Pioneer's right to a prompt determination of the validity of its permit.

Plaintiffs Wilmer and Edith Brockman were finally served with process in the trial court proceedings on June 1. Briefing was completed on June 2.

The Appellate Court issued a written decision on July 27, agreeing with Pioneer on its first contention, stating:

> Plaintiffs initiated the Board proceedings as mandated by statute. However, seven weeks after the proceedings were initiated and approximately two weeks before the Scheduled Board hearing could take place, plaintiffs filed the instant complaint seeking injunctive relief. The Board did not have a chance to rule on any of the plaintiffs' claims. Therefore, it is clear that the plaintiffs did not exhaust their administrative remedies.

The Court stated that the trial court should have dismissed the complaint and reversed, stating that the preliminary injunction was dissolved. The Appellate Court found that it was unnecessary to pass on the other four grounds for reversal presented by Pioneer.

The Court carefully considered and rejected Petitioners' argument that the present case met one of the recognized excep-

tions to the exhaustion remedy, particularly the argument that the case involved a clear violation of legal duty on the part of the EPA. The Court disagreed, stating, "we do not find any clear cut violation of the statute that would place plaintiffs in that situation".

On August 17, the Appellate Court issued an order staying the issuance of its mandate pending action by the Illinois Supreme Court.

H. PROCEEDINGS BEFORE THE ILLINOIS SUPREME COURT

On August 17, 1981, Petitioners filed a Petition for Appeal As Of Right, Or, In The Alternative, For Leave To Appeal with the Illinois Supreme Court. The petition argued that the Appellate Court misapplied the exhaustion of remedies doctrine and that the Appellate Court decision deprived them of a state court forum.

Pioneer filed an Answer denying that the exhaustion remedy had been misapplied and strenuously disagreeing that Petitioners had been precluded from a state court forum at the time they interferred with the Board proceedings by going to the Circuit Court, first by securing a preliminary injunction and then, on April 6, securing an order purporting to enjoin the Board proceedings.

The Illinois Supreme Court denied both grounds of the Petition on October 17, 1981. They stayed their mandate pending a decision by this Court on the Petition for Writ.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT FALL WITHIN THE CRITERIA ENUMERATED IN SUPREME COURT RULE 17.1 AS SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

Petitioners never make any specific reference to the criteria of Supreme Court Rule 17 or identify precisely how it would apply to this case and justify the exercise of the Court's discretion in granting their Petition. Since it is difficult to hit a moving or non-existent target, Respondents will address each subparagraph of Rule 17.1 separately.

A. This case does not fall within the criteria of Rule 17.1(a) or (b).

Rule 17.1(a) deals exclusively with review of federal court of appeals decisions or proceedings. The present case involves decisions by the courts of the State of Illinois and obviously does not fall within the provisions of this subparagraph.

Rule 17.1 (b) applies to decisions involving federal questions by state courts of last resort which are in conflict with decisions by another state court of last resort or of a federal court of appeals.

The instant case does involve a decision by a state court of last resort. The allegation that Petitioners have been denied due process, if supported by the facts of the case, would certainly raise a federal question. However, Petitioners do not cite any conflicting decisions of any federal court of appeals or any

other state court and the present case clearly does not fall within the provisions of subparagraph (b).

B. This case does not fall within the criteria of Rule 17.1(c).

Rule 17.1(c) applies to state court of last resort or federal appellate court decisions (1) on important federal questions which have not, and should be ruled on by the Court or (2) which are in conflict with applicable decisions on federal questions by this Court.

The present case surely does not fall within the first proviso; this Court has repeatedly held that:

> [A] state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. *(Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 679 (1930).

Respondents certainly agree with this oft-repeated principal of constitutional law; if Petitioners had also asserted that citizens are entitled to jury trials for specific classes of crimes, or that a citizen's property cannot be taken without just compensation, or that the Constitution guarantees free speech, we would readily agree to those general statements.

Respondents do not agree, however, that Petitioners have presented to this Court "applicable decisions" of this Court, which, when applied to the facts of this case, conflict with the decisions of the Illinois courts in this case. Furthermore, we submit that the facts and applicable statutes in this case do not support Petitioners' factual assertion that they had no access to a state court forum.

Petitioners cite a series of decisions by this Court that pertain to the general issue of denial of access to the courts by the state; however, all of the cases are easily distinguishable from the present case and Petitioners have failed to establish that the present case is in conflict with decisions of this Court.

Petitioners cite *Boddie v. Connecticut*, 401 U.S. 371 (1971) and *Little v. Streater* ___ U.S. ___, 101 S.Ct. 2202 (1981); however, both of those cases involve situations where indigents were effectively denied access to state courts because of fee/cost requirements (filing fee for divorce and cost of paternity blood tests) and thus denied due process. Petitioners, who have been told by two higher courts and ten reviewing judges that there is no merit to their position and yet have persisted in filing this Petition, however ill-founded, can hardly claim that they have been denied access to the courts because of indigency.

They have also cited *Bounds v. Smith*, 430 U.S. 817 (1977) and *Wolff v. McDonnell*, 418 U.S. 539 (1974). Both of these cases involve the rights of prisoners (to access to legal libraries and/or legal assistance and to certain minimal standards in disciplinary proceedings). They have no application to the present case (unless Pioneer could be deemed a prisoner of endless litigation).

They cite *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937) which can also be easily distinguished. In that case, the Public Utilities Commission, after extensive hearings, entered an order giving relief which drastically departed from the announced purpose of the hearings and which was based on massive amounts of data which had never been made a part of the record.

In the present case, Petitioners assert *prospectively* that they could not get an adequate hearing before the Illinois Pollution Control Board, a quasi-judicial body. The Board had scheduled a hearing; however, because of Petitioners' voluntary actions in submitting their Motion to Enforce and securing the incredible Order of April 6: (1) no hearing was held; (2) the Board has had no opportunity to consider evidence, whether

secret or otherwise; and (3) the Board has entered no final Order, proper or improper.

Finally, Petitioners have cited *Brinkerhoff-Farris Trust & Savings Company v. Hill, supra.* That case involved a plaintiff pursuing its remedies in good faith reliance on long-standing rulings of the Missouri Supreme Court, only to have that Court completely reverse its position and then claim that plaintiff was barred from relief because it failed to follow a procedure which had not been in existence at the time it should have acted. That is not the situation in the present case. Petitioners had a clear remedy, appeal to the Board of the permit issuance, and they availed themselves of it. There is no doubt that all of the issues they raised would have been ruled on, by the Board and/or the Appellate Court. There has been no retroactive court decision which has changed their position.

The only change in position was Respondents' attempt, after initiating the proceedings, to abandon the statutorily mandated Illinois Pollution Control Board hearings, a series of actions which may subsequently be held to be tantamount to an act of defenestration.

II. PETITIONERS' CONTENTION THAT THEY HAD NO STATE FORUM FOR PRESENTATION OF DUE PROCESS ISSUES IS LEGALLY AND FACTUALLY INCORRECT.

A. The Illinois Pollution Control Board Has Not Ruled That It Will Not Consider Constitutional Issues Presented By This Case.

Petitioners have placed heavy reliance on out-of-context quotations from the Board's interlocutory one-page opinion in *Illinois Power Company v. Environmental Protection Agency,* ___ PCB Opinions ___, (PCB No. 79-61, January 8, 1981) to support their argument that the Board cannot or will not decide any constitutional issues raised in the Board permit appeal proceedings. That decision is reprinted in the appendix at A-1.

This interlocutory order upheld a ruling by a hearing officer that Illinois Power was not entitled, in an appeal of a permit denial, to conduct certain discovery. The Agency had designated a cooling water reservoir "waters of the State." Illinois Power apparently sought discovery inquiring into previous Agency determinations on other reservoirs with the object of showing that this particular determination was inconsistent with prior determinations and therefore denied equal protection of the law.

The Board opinion merely limited the scope of discovery. While some of the language could be interpreted to support the argument that the Board will not decide the due process issues raised in Petitioners' permit appeal, Pioneer submits the following items for consideration by this Court:

(a) This is an interlocutory ruling by the Board. Petitioners do not cite, and Pioneer is unaware of, any final Board decisions which state the alleged restriction in clear and unequivocal language.[2]

(b) The present case can be distinguished on the facts: Illinois Power was seeking to prove denial of equal protection by examination of all previous Agency determinations of whether other cooling water impoundments were waters of the State, a highly questionable legal approach; in the present case, the Agency held a statutorily mandated public hearing at which a record was made and the Petitioners, following their statutory remedy, have appealed to the Board.

---

[2] The cavalier assertion on page 10 of the Petition that the "Board's holdings on this point are unequivocal, and appear both in its opinions in other cases . . ." is so reckless as to call into question whether Petitioners are intentionally misleading this Court. Respondents have repeatedly asserted in the courts below (Appellate Court Reply Brief, page 14 and Illinois Supreme Court Answer, page 22) that this is an isolated interlocutory order, that Petitioners have been unable to cite supporting decisions and the Respondents are unaware of any other Board decisions or orders supporting Petitioners' position. They have failed to cite or provide opinions again and their assertion is, at best, irresponsible.

(c) The Board has not ruled that it will not consider the due process issues in this case. It has certainly had the opportunity to do so, in that it has issued two interim opinions in this matter. Interim Orders of February 5 and March 5, 1981. (Appendix, A-3 and A-4)

(d) Petitioners filed their Board appeal 18 days after the *Illinois Power Company* ruling. They still chose to file this action before the Board and invoke its jurisdiction to determine the issues submitted. To the extent that alternative remedies were available, Petitioners made an election of remedies.

(e) Even if this Court were inclined to overlook Petitioners' apparent ignorance of the law (a plea which has not been submitted by Petitioners), the fact is that Petitioners failed to ask the Board for a ruling on this issue. Instead, they voluntarily decided to proceed on their own interpretation and filed 27 pages of pleadings in the Circuit Court on March 20th, 71 days after the *Illinois Power Company* decision, 53 days after they filed their permit appeal, and 16 days before the scheduled Board hearing.

B. Even If The Board Declines To Decide The Due Process Issue, Petitioners Are Not Denied A State Court Forum.

Petitioners' argument that they will be denied a state court forum is unfounded and based on an abysmal ignorance of or a willful disregard for applicable statutory and case law.

Petitioners filed their permit appeal pursuant to Section 40(b) of the Illinois Environmental Protection Act (1979 Ill. Rev. Stat., Chap. 111½, Sec. 1040(b)). Along with numerous other allegations, they aggressively stated their contention that the process followed by the Agency violated Petitioners' constitutional rights to due process (C.62, 63).

Section 41 of the Act (Chap. 111½, Sec. 1041) provides:

> Any party to a Board hearing, any person who filed a complaint on which a hearing was denied, any person

> who has been denied a variance or permit under this Act, and any party adversely affected by a final order or determination of the Board may obtain judicial review, by filing a petition for review within thirty-five days after entry of the order or other final action complained of, pursuant to the provisions of the "Administrative Review Act," . . . except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court.

Petitioners are apparently unaware that Section 11 of the Illinois Administrative Review Act (1979 Ill. Rev. Stat., Chap. 110, Sec. 274) mentioned above provides:

> Scope of Review. Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and of fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

There can be little doubt in the mind of a reasonably literate reader that, under the explicit terms of Section 11 of the Illinois Administrative Review Act, Petitioners, who have raised the issue of denial of due process in their permit appeal before the Board will be fully entitled to have this specific question of law considered by the reviewing judicial tribunal, even if the Board declines to rule on the issue.

The Illinois Supreme Court has specifically considered the question of the necessity and propriety of raising constitutional issues before the Board. In *Bulk Terminals v. Environmental Protection Agency*, 65 Ill. 2d 31, 357 N.E. 2d 430, 2 Ill. Dec. 263 (1976), an enforcement action was filed against Bulk Terminals before the Board. Bulk Terminals filed a motion to dismiss on

the grounds of double jeopardy, claiming they had already been prosecuted for their actions by the City of Chicago. The Board denied the motion and Bulk Terminals sought injunctive relief from the Circuit Court.

The Illinois Supreme Court held that Bulk Terminals had failed to exhaust its administrative remedies by proceeding before the Board and was not entitled to injunctive relief, stating:

> *It is clear* that the motions to dismiss filed before defendant Pollution Control Board were the appropriate method by which to present the issue and *that the Board had jurisdiction to decide the question*. (emphasis added) 2 Ill. Dec. 263, 265.

Finally, even if the Board applies its *Illinois Power Company* rationale to the present case, Petitioners are not left without a state court forum, as the Board points out:

> "This finding of the Board *does not leave* Illinois Power Company *without relief as it may appeal* this decision *to the Illinois Appellate Court* or institute an action in the Circuit Court." (emphasis added.)

Illinois Power Company, supra.

C. Petitioners' Allegation That The Board Would Not Allow Them To Make A Record On Constitutional Issues Is Inaccurate And Misleading.

The Petition reveals a certain lack of understanding about the powers and role of the hearing officer in Board proceedings. His function is primarily limited to regulating the taking of evidence and insuring that an orderly record is prepared and presented to the Board, which then reviews the record and makes a decision. He is authorized to regulate discovery, hold pre-hearing conferences, conduct the hearing and make rulings on the introduction of evidence. Illinois Pollution Control Board Procedural Rule 316. (A-7) He is specifically prohibited from ruling on motions to dismiss, from deciding proceedings on the merits, from dismissing for failure to state a claim or

for want of jurisdiction, or from striking any claim or defense for insufficiency or lack of proof. All such motions must be referred to the Board. Illinois Pollution Control Board Procedural Rule 308(e). (A-9)

With those limitations, the hearing officer's declining to rule on constitutional or legal issues was entirely appropriate. To the extent that Petitioners desired to raise constitutional issues, the had a clear obligation to present those issues directly to the Board. They failed to do so.

Petitioners' allegation that the Board would not allow them to make a record is entirely without merit. The Board had already given explicit instructions for the evidentiary procedures to be followed in this specific case. On February 13, Pioneer filed a Motion in Limine before the Board, asking that certain limits be observed in the taking of evidence at the scheduled April 6 hearing.

On March 5, the Board issued a ruling on the Motion in Limine (C. 112-14). The Board said:

> "The hearing Officer in general should allow offers of proof where there is reasonable doubt as to admissibility. Extraneous material can later be striken from the record, but omitted material will require a new hearing if it is later judged admissible by the Board or a higher court." (A-4-5)

and later

> "The Board does not require mere repetition of evidence or testimony which is already in the Agency record. If evidence outside the Agency record is offered, the Board requests that the Hearing Officer rule on its admissibility considering Section 39(a) and Section 40(b) of the Act, and the issues noted above. If the Hearing Officer admits evidence, the adverse parties may note their objections to the Board. If the Hearing Officer rules the evidence inadmissible because it was not in the Agency record, he should allow the party to proceed with an offer of

> proof where the proffer is otherwise relevant. In making offers of proof parties should explain why the evidence is not a part of the Agency record." (A-5-6)

In view of the Board's explicit direction that parties be permitted to make offers of proof, Plaintiffs' assertion that they would not be permitted to make a record can only be described as incredible.

Finally, we call the Court's attention to the fact that the hearing officer explicitly told Petitioners that they could submit offers of proof, stipulations of fact and sworn answers to interrogatories as a part of the record. The Agency attorney indicated his willingness to cooperate.

Petitioners' apparent inability to hear or understand the Board ruling and the hearing officer's rulings may eventually turn out to be a self-fulfilling prophecy. Petitioners in effect voluntarily decided not to attend the Board hearing on April 6.

We submit that the most frank statement of Petitioners' position was made by their counsel at the April 6 hearing on the Motion to Enforce, when he said, speaking on behalf of Petitioners:

> We'll state right now none of the parties to the Pollution Control Board proceeding wants to go forward. That's not a problem.
>
> And, finally, we're simply asking the Court for an order against everybody here. And, if the Court wants to order against us, that's fine. Although, we'll voluntarily agree not to go forward with the hearing. Transcript, April 6, 1981, pages 43-44.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

THOMAS J. IMMEL
Attorney for Respondents
Pioneer Development,
Pioneer Processing, Inc.
and William Clarke

Of Counsel:
THOMAS J. IMMEL
Burditt and Immel
741 South Grand West
Springfield, IL 62704
(217) 789-1414

LEE K. ZELLE
741 South Grand West
Springfield, IL 62704
(217) 528-3464

APPENDIX

APPENDIX

ILLINOIS POLLUTION CONTROL BOARD

January 8, 1981

ILLINOIS POWER COMPANY,
Petitioner,
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent.
} PCB 79-61

ORDER OF THE BOARD (by I. Goodman):

On December 12, 1980 the hearing officer herein requested Board review of his November 21, 1980 ruling which upheld objection by the Agency to interrogatories filed by Illinois Power Company on July 8, 1980.

In its argument Illinois Power Company states that the purpose of the interrogatories is to obtain factual information necessary to support one of the arguments it raises in this permit review proceeding concerning the imposition of effluent limitations and monitoring requirements. More specifically, the intent of the interrogatories is to question the Agency's characterization of the reservoir as a water of the State when, as Illinois Power alleges, the Agency does not so characterize other such impoundments. The issue centers upon Illinois Power Company's constitutional right to equal protection of the law.

The Board finds that it lacks the authority to decide that question in a proceeding pursuant to Section 40 of the Illinois Environmental Protection Act. As the Board has previously stated, "under the Statute all the Board has authority to do in a hearing and determination on a Section 40 petition is to decide after a hearing . . . whether or not, based upon the facts of the

application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations." *Oscar Mayer & Company vs. IEPA*, PCB 78-14, June 8, 1978 (Interim Order of the Board). The Board in the past has considered the scope of the subject matter of a permit denial appeal under Section 40 to be strictly limited. As it is the Board's opinion that it may not decide the issue underlying the interrogatories, the hearing officer's order of November 21, 1980 is hereby affirmed.

This finding of the Board does not leave Illinois Power Company without relief as it may appeal this decision to the Illinois Appellate Court or institute an action in the Circuit Court.

IT IS SO ORDERED.

Mr. Werner dissents.

I, Christian L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 8th day of January, 1981 by a vote of 4-1.

/s/ Christian L. Moffett, Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

February 5, 1981

COUNTY OF LA SALLE, et al., Petitioners, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, et al. Respondents.	PCB 81-10

ORDER OF THE BOARD (by I. Goodman):

Petitioners' January 26, 1981 petition to review the Agency's issuance on December 22, 1980 of a permit to the named respondents to develop a hazardous waste disposal site is accepted for further proceedings.

A hearing is ordered to be set and held as expeditiously as possible. Pursuant to §40(a) of the Illinois Environmental Protection Act, the date by which the Board's decision on the petition is due is 90 days from January 26, 1981, or April 26, 1981 (April 24, 1981).

IT IS SO ORDERED.

I, Christian L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 8th day of February, 1981 by a vote of 5-0.

/s/ Christian L. Moffett, Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

March 5, 1981

COUNTY OF LA SALLE, et al., Petitioners, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; WILLIAM CLARKE; PIONEER DEVELOPMENT, et al., Respondents.	PCB 81-10

ORDER OF THE BOARD (by D. Satchell):

On February 13, 1981 Respondents William Clarke, Pioneer Development and Pioneer Processing, Inc. (Pioneer) filed a motion to strike and a motion in limine requesting clarification of language in Section 40(b) of the Act and recently amended Procedural Rule 503(a) concerning the scope of the hearing in third party permit appeals. Pioneer asks the Board to take official notice of the record in PCB 80-184, *Alliance for a Safe Environment, et al. v. Akron Land Corp., et al.* Pioneer questions certain rulings of the Hearing Officer in that matter. Petitioners filed objections to the motions on February 18 and February 27, 1981.

The Board has not decided the Akron case and declines to rule on it in this context. However, the Board will provide guidance on the general questions. The Hearing Officer in general should allow offers of proof where there is a reasonable doubt as to admissibility. Extraneous material can later be stricken from the record, but omitted material will require a

new hearing if it is later judged admissible by the Board or a higher court.

The uncertainty in this case lies in the application of the following language of Section 40(b) of the Environmental Protection Act (Act): "Such hearing shall be based exclusively on the record before the Agency." A question arises as to what evidence may be admitted at the hearing if the Board's consideration is to be based exclusively on the record before the Agency (*Menard v. Bowman Dairy Co.*, 296 Ill. App. 323, 15 NE 2d 1014, 1015).

The Board has long held that a similar rule applies in appeals by the permit applicant (*Soil Enrichment v. IEPA*, PCB 72-364, 5 PCB 715, October 17, 1972; *Oscar Mayer v. IEPA*, PCB 78-14, 30 PCB 397, 32 PCB 243, June 8 and December 14, 1978; *Environmental Site Developers v. IEPA*, PCB 80-15, 38 PCB 443, June 12, 1980).

Where a third party contests the grant of a permit there is an issue as to whether there was proof by the applicant that the facility "will not cause a violation of the Act" or Board rules. There is a further issue as to whether any conditions in the issued permit are "inconsistent with" Board regulations. The third party could seek to prove that conditions are not "necessary to accomplish the purposes of the Act," although the third party would ordinarily argue for more stringent conditions. There is also a possibility that the third party may offer additional conditions, not inconsistent with Board rules, and seek to prove that they are "necessary to accomplish the purposes of the Act" [Section 39(a) of the Act].

The Board does not require mere repetition of evidence or testimony which is already in the Agency record. If evidence outside the Agency record is offered, the Board requests that the Hearing Officer rule on its admissibility considering Section 39(a) and Section 40(b) of the Act, and the issues noted above. If the Hearing Officer admits evidence, the adverse parties may note their objections to the Board. If the Hearing Officer rules the evidence inadmissible because it was not in

the Agency record, he should allow the party to proceed with an offer of proof where the proffer is otherwise relevant. In making offers of proof parties should explain why the evidence is not a part of the Agency record. At the hearing the Hearing Officer should allow a reasonable time for members of the public who are not parties to comment.

This Order is intended only to offer guidance to the Hearing Officer and parties in the conduct of the hearing. It is not intended as a holding on any of the legal questions discussed.

Petitioners should be advised that Section 40(a) of the Act provides that Pioneer may deem the permit issued unless the Board rules on the petition within ninety days of its filing. In *Akron* the Board held that this time may be extended only by the permit applicant. Petitioners should be further advised that Procedural Rule 504 requires them to furnish a stenographic transcript of the hearing at their expense.

The Board will decide the motion to strike with the case.

IT IS SO ORDERED.

I, Christian L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 5th day of March, 1981 by a vote of 5-0.

/s/ Christian L. Moffett, Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
PROCEDURAL RULE 316

316 Authority of Hearing Officer. The Hearing Officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear and complete record. He shall have all powers necessary to these ends including (but not limited to) the authority to:

(a) Issue discovery orders;

(b) Rule upon objections to discovery orders;

(c) Make such protective orders as justice requires, denying, limiting, conditioning or regulating discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party obtaining such materials;

(d) Hold pre-hearing conferences for settlement, simplification of the issues, or any other proper purposes;

(e) Administer oaths and affirmations;

(f) Rule upon offers of proof and receive evidence and rule upon objections to the introduction of evidence, subject to Rule 319;

(g) Regulate the course of the hearings and the conduct of the parties and their counsel;

(h) Examine witnesses for the sole purpose of clarifying the record established by the parties at the hearing. When any party is not represented by counsel, the Hearing Officer may examine and cross examine any witness to insure a clear and complete record. However, the Hearing Officer may not exclude exhibits or other testimony as a result of his examination unless all parties so agree;

(i) Except as otherwise provided, consider and rule as justice may require upon motions appropriate to an adjudicative proceeding.

ILLINOIS POLLUTION CONTROL BOARD
PROCEDURAL RULE 308

308 Motions and Answers.

(a) Unless respondent files an answer within 30 days of receipt of the complaint, all material allegations shall be taken as denied. All motions preliminary to a hearing shall be presented to the Board or to the Hearing Officer at least 14 days prior to the date of the hearing, or on such other date as the Hearing Officer or the Board shall designate. All motions to dismiss or strike the complaint or challenging the jurisdiction of the Board shall be filed within 14 days after receipt of complaint, directed to the Board and shall be disposed of prior to hearing on the complaint, subject, however, to the provisions of subsection (e) and (i) of this Rule. All motions must be served on all parties, including the Agency and its representative and the Hearing Officer designated by the Board with proof of service. Oral argument on motions before the Board shall be permitted only by order of the Board.

(b) Unless made orally on the record during a hearing or unless the Hearing Officer directs otherwise, a motion shall be in writing, accompanied by any affidavits or other evidence relied on and, when appropriate, by a proposed order.

(c) Within 7 days after service of a written motion, or such other period as the Board or Hearing Officer may prescribe, a party may file a response in support of or in opposition to the motion, accompanied by affidavits or other evidence. If no response is filed, the parties shall be deemed to have waived objection to the granting of the motion, but such waiver of objection does not bind the Board in its determination. The moving party shall not have the right to reply, except as permitted by the Hearing Officer or the Board.

(d) No oral argument will be heard on a motion before the Board unless the Board so directs. A written brief may be filed with a motion or an answer to a motion, stating the arguments and authorities relied on.

(e) The Hearing Officer shall rule upon all motions, except that he shall have no authority to dismiss, or rule upon a motion to dismiss or decide a proceeding on the merits, or for failure to state a claim, or for want of jurisdiction, or to strike any claim or defense for insufficiency or want of proof. The Hearing Officer shall refer any such motions to the Board, pursuant to subparagraph (a) of this section. Notwithstanding the provisions of paragraph (a) above, the Board in its discretion, may direct that hearing on the proceeding be conducted and, in its discretion, may take all motions directed to it with the case. This conditional ruling by the Board shall not foreclose a party from advancing the same contentions as to jurisdiction or adequacy of the complaint upon the completion of the hearing.

(f) No interlocutory appeal of a motion may be taken to the Board from a ruling of the Hearing Officer, except by allowance of the Board after motion filed by a party or the Hearing Officer. When in the judgment of the Hearing Officer prompt decision is necessary to prevent harm to the public interest or to avoid unusual delay or expense, the Hearing Officer may refer the ruling promptly to the Board and notify the parties either by announcement on the record or by written notice if the hearing is not in session.

(g) Rulings of the Hearing Officer may be reviewed by the Board after conclusion of the hearing, but will be set aside only to avoid material prejudice to the rights of a litigant. The Hearing Officer, if a member of the Board, may vote upon motions to review his rulings as Hearing Officer.

(h) Unless otherwise provided herein or ordered by the Board, neither the filing of a motion nor the certification of a question to the Board shall stay the proceeding or extend the time for the performance of any act.

(i) Any party may participate in the proceedings without forfeiting any jurisdictional objection, if such objection is raised at or before the time the respondent files his initial pleading or motion, or, if no pleading or motion is made, within 14 days after receipt of complaint. All jurisdictional objections shall conform to the requirements of subsection (a) of this Rule.

Petitioner's Reply Brief

No. 81-894

Office - Supreme Court, U.S.
FILED
JAN 5 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,

Petitioners,

v.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,

Respondents.

PETITIONERS' REPLY TO THE RESPONDENTS' OPPOSITION TO THE PETITION FOR CERTIORARI

GARY PETERLIN

Of counsel:
JOSEPH V. KARAGANIS
RUSSELL R. EGGERT
Special Assistant State's Attorneys
BRUCE WHITE
O'Conor, Karaganis & Gail Ltd.
130 East Madison Street
Ottawa, Illinois 61350
(815) 434-6206
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905

Pandick Press Midwest, Inc., Chicago • 454-7600

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

	PAGE
Austin Liquor Mart, Inc. v. *Department of Revenue*, 18 Ill. App. 3d 894, 310 N. E. 2d 719 (1974)	4
Boddie v. *Connecticut*, 401 U. S. 371 (1971)	4
Borg-Warner Corporation v. *Mauzy*, ___ Ill. App. 3d ___, 56 Ill. Dec. 335, 427 N. E. 2d 415 (1981)	2
Bounds v. *Smith*, 430 U. S. 817 (1977)	4
Brinkerhoff-Faris & Trust Co. v. *Hill*, 281 U. S. 673 (1930)	4
Illinois Power Company v. *Environmental Protection Agency*, ___ PCB Opinion ___ (PCB No. 79-61, January 8, 1981)	3, 4
Little v. *Streater*, ___ U. S. ___, 101 S. Ct. 2202 (1981)	4
Schmitt v. *Chicago Transit Authority*, 34 Ill. App. 2d 67, 179 N. E. 2d 838 (1962)	4
Wolff v. *McDonnell*, 418 U. S. 539 (1974)	4

Statutes

Illinois Administrative Procedure Act, Ill. Rev. Stat., ch. 127, § 1001 *et seq.*	2
Illinois Administrative Procedure Act, Ill. Rev. Stat., ch. 127, § 1014	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON,

Petitioners,

v.

MICHAEL M. MAUZY, Director, Illinois Environmental Protection Agency, an agency of the State of Illinois; ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an agency of the State of Illinois; PIONEER DEVELOPMENT; PIONEER PROCESSING, INC., a corporation; WILLIAM CLARKE; and WILMER and EDITH BROCKMAN,

Respondents.

PETITIONERS' REPLY TO THE RESPONDENTS' OPPOSITION TO THE PETITION FOR CERTIORARI

Throughout the course of proceedings in this case—in the trial court, the Illinois appellate court, and the Illinois supreme court—the Pioneer respondents have attempted to confuse the issues, primarily by directing an extraordinary amount of vitriol toward Petitioners' counsel. Pioneer's brief in opposition to the petition for certiorari is but another example of this strategy.[1]

[1] Pioneer Development, Pioneer Processing, Inc. and William Clarke (referred to collectively as "Pioneer") are the only respondents that have filed any objections to the petition for certiorari. Apparently, neither the Illinois Environmental Protection Agency nor the Brockmans, all of whom appeared in the Illinois supreme court below, have any objection to the granting of the writ.

There is no need for any reply to Pioneer's continuous stream of unseemly sarcasm, however, because when all of the snide commentary is set aside, it is apparent that Pioneer has not made—and cannot make—any substantive response to Petitioners' argument: that Petitioners have a right of access to a judicial forum to resolve disputed issues of fact underlying alleged violations of their constitutional and statutory rights, where there is no other forum with the power to afford Petitioners relief; and that a denial of access to the courts for such purpose is a denial of the most fundamental due process.

Pioneer has not disputed, nor can it dispute, that the permit proceedings were governed by the "contested case" provisions of the Illinois Administrative Procedure Act, Ill. Rev. Stat. ch. 127, § 1001 et seq., which embodies procedural provisions parallel to the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution: full disclosure of all evidence to all parties; an opportunity to respond and present rebuttal evidence; an opportunity for cross-examination; and a prohibition against *ex parte* communications. Indeed, the Illinois appellate court has very recently held the state's Administrative Procedure Act applicable to permit proceedings conducted by the Illinois Environmental Protection Agency. *Borg-Warner Corporation* v. *Mauzy*, ____ Ill. App. 3d ____, 56 Ill. Dec. 335, 427 N. E. 2d 415 (1981).

Pioneer cannot dispute that the Agency, in concert with Pioneer, engaged in wholesale violations of these statutory and constitutional protections in the permit proceeding:

1. The Agency received repeated *ex parte* communications from the applicant concerning the merits of the permit application—without notice to Petitioners and without giving Petitioners an opportunity to respond to these *ex parte* submissions;

2. Pioneer's December 12, 1980 *ex parte* submittal disclosed prior *ex parte* contacts, which in turn led to

testimonial admissions by Agency officials of numerous other *ex parte* communications between the Agency and Pioneer and others;

3. Agency personnel admitted reliance on all of these *ex parte* submittals in making the decision to issue a permit to Pioneer;

4. All of these *ex parte* contacts were concealed from Petitioners and the general public up to the time the permit was issued, and to this day the full extent of these *ex parte* communications is unknown; and

5. The Agency itself has admitted in writing that it violated Petitioners' rights (C. 55-56, A-15).

Pursuant to the Illinois Administrative Procedure Act, where—as here—the procedures have been violated, the actions of the Agency "shall be void." Ill. Rev. Stat. ch. 127, § 1014.

Pioneer has not disputed, nor can it dispute, that when Petitioners sought to bring the violations before the Board to have the permit voided, the Illinois Pollution Control Board and its hearing officer made it clear that the Board would not rule on the constitutional and statutory issues;[2] and because the Board's review was "on the record" made before the Agency,

[2] Pioneer has gone to great length in an effort to discount or discredit the recent ruling by the Board in *Illinois Power Company v. Environmental Protection Agency*, ____ PCB Opinion ____ (PCB No. 79-61, January 8, 1981), that the Board will not consider constitutional or statutory procedural issues. The crux of Pioneer's argument is that *Illinois Power* is an "isolated" case, and that "petitioners have been unable to cite supporting decisions and the respondents are unaware of any. . . ." (Respondents' brief, n. 2 at p. 22). The most telling aspect of Pioneer's argument is its failure to cite any Board decisions contrary to or inconsistent with *Illinois Power*. Pioneer's rhetoric notwithstanding, the *Illinois Power* decision is binding precedent in Board proceedings and was plainly followed by the hearing officer in this case.

Petitioners could not even make a record of the facts underlying the claimed constitutional and statutory violations for review by the Illinois appellate court.[3]

Instead, the Board told Petitioners to present the issues to the circuit court (*see, Illinois Power Company, supra*). When the Petitioners brought the issues to the circuit court, they succeeded in proving the merits of their claims—only to be told by the Illinois appellate court that they had no right to be there; and that Petitioners should first seek an administrative remedy which, in fact, was never available and which is not now open to them. In the face of these undisputed facts, this case is indistinguishable from *Brinkerhoff-Faris & Trust Co.* v. *Hill*, 281 U. S. 673 (1930), which came before this Court in virtually the same procedural posture as this case, and in which the Court held that a state court's decision depriving a litigant of a judicial remedy for the enforcement of its constitutional rights where no other remedy was available was a denial of fundamental due process.

Nor can Pioneer distinguish the other cases cited by Petitioners in support of the argument that Petitioners are entitled to a judicial forum to resolve the disputed issues of fact underlying the alleged violations of their constitutional and statutory rights where there is no other forum which can afford Petitioners a remedy: *Boddie* v. *Connecticut*, 401 U. S. 371 (1971); *Little* v. *Streater*, ____ U. S. ____, 101 S. Ct. 2202, 2205 and 2210, n. 12 (1981); *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Bounds* v. *Smith*, 430 U. S. 817 (1977). Pioneer

[3] In its brief, Pioneer suggests that such evidence might be submitted by way of offer of proof. But the hearing officer refused to allow petitioners to call any witnesses, and dictated that any offer of proof be in the form of a narrative statement by counsel. Under Illinois law, this form of an offer of proof would be defective and could not be considered on appeal. *Austin Liquor Mart, Inc. v. Department of Revenue*, 18 Ill.App.3d 894, 310 N.E.2d 719, 728 (1974); *Schmitt v. Chicago Transit Authority*, 34 Ill.App. 2d 67, 179 N.E.2d 838, 842-43 (1962).

sought to distinguish these cases with simple sarcasm; but Pioneer cannot escape the fact that each of these cases involved citizens who had been excluded by lower courts from the only forum effectively in power to settle their disputes, and in each case the Court held that the aggrieved citizen had a right of access to a judicial forum for relief.

At a time when state courts are—quite rightly—being called upon to shoulder a larger share of the litigation which has all too frequently been funneled to the federal courts in recent years, the Illinois courts below have not performed their proper function. Petitioners believe that cases like this one are best resolved, if possible, in the state courts. Unfortunately, the Illinois courts have made themselves unavailable, and have made resolution of this case in a state forum impossible. This Court should grant the writ to correct this important error.

CONCLUSION

Petitioners request that the court grant the writ and reverse the decision below.

Respectfully submitted,

COUNTY OF LASALLE, ex rel. GARY PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, and ROSEMARY SINON

Petitioners

GARY PETERLIN

Of counsel:
JOSEPH V. KARAGANIS
RUSSELL R. EGGERT
Special Assistant State's Attorneys
BRUCE WHITE
O'Conor, Karaganis & Gail Ltd.
130 East Madison Street
Ottawa, Illinois 61350
(815) 434-6206
150 North Wacker Drive
Suite 2500
Chicago, Illinois 60606
(312) 782-1905